The Digest of Justinian

Volume I

English-language translation edited by

Alan Watson

THE DIGEST OF JUSTINIAN

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TRANSLATION EDITED BY

ALAN WATSON

VOL. 1

PENN

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PREFACE TO THE PAPERBACK EDITION

This is a corrected edition, minus the Latin text, of the four-volume *The Digest of Justinian*, Latin text edited by Theodor Mommsen with the aid of Paul Krueger, English translation edited by Alan Watson, published by University of Pennsylvania Press in 1985.

This edition incorporates a number of corrected translations. I am grateful to all who called suggested changes to my attention, and in particular to Tony Honoré and Olivia Robinson.

The biggest change has been a new translation by Sebastian and Olivia Robinson of the *Dédoken*, the Greek version of the preface, "The Confirmation of the *Digest*." The previous edition repeated the translation of the rather different Latin preface.

A note about the appearance of the pages. The pagination of the Mommsen edition has been maintained, as was done in the original four-volume hardcover edition. As a result, the pages of the translation vary in length.

ALAN WATSON

PREFACE TO THE ORIGINAL EDITION

The compilation of Roman law which was enacted under the Byzantine emperor, Justinian I (c. 482–565), and which, together with that emperor's later laws, subsequently came to be known as the *Corpus Juris Civilis* has been without doubt the most important and influential collection of secular legal materials that the world has ever known. The compilation preserved Roman law for succeeding generations and nations. All later Western systems borrowed extensively from it. But even more significantly, that strand of the Western tradition encompassing the so-called civil law systems—the law of Western continental Europe, Latin America, the parts of Africa and other continents which were former colonies of continental European powers, and to some extent Scotland, Quebec, Louisiana, Sri Lanka, and South Africa—derives its concepts, approaches, structure, and systematics of private law primarily from the long centuries of theoretical study and putting into practice of the *Corpus Juris Civilis*.

Of the *Corpus Juris Civilis* the most important part is the *Digest*, the others being the *Code*, the *Institutes*, and the *Novels*.

Justinian became co-emperor with his uncle Justin in 527, and sole emperor when Justin died in the following year. At once he began to restate the law. He first appointed a commission to make a collection of imperial rescripts, that is, enactments or statements of the law. The rescripts were to be updated. This resulted in the first *Code* of 530 which has not survived because it was replaced by a revised *Code* in 534. The revised *Code* is in twelve books divided into so-called titles (or chapters), each devoted to a particular subject, in which the rescripts are arranged chronologically. After the first *Code*, Justinian turned his attention to the writings of the classical Roman jurists, primarily from the first century B.C. to the end of the first third of the third century A.D. Discussions of disputed points of law abounded in their works, and Justinian, to resolve some of the most important disputes, promulgated the *Fifty Decisions* which have not survived as an entity, but many of the individual decisions presumably remain as rescripts in the second *Code*. In December 530 he ordered the collection and abridgment of juristic writings which is called the *Digest*. He also ordered the preparation of a new elementary textbook for students, the *Institutes*, which was modeled primarily on the *Institutes* of the second-century jurist, Gaius, and which came into effect as statute on the same day as the *Digest*, December 30, 533. This elementary work is in four books; it is the most systematically arranged part of the *Corpus Juris Civilis*, and, directly and indirectly through the mediation of seventeenth- and eighteenth-century works modeled on it, it has become the basis for the structure of almost all of the modern civil codes. After the completion of the compilation of existing law, Justinian continued to legislate and these later rescripts are known as the *Novellae* or *New Constitutions*. They have had relatively little impact on later Western law.

The classical jurists wrote numerous books of various types: general commentaries on the civil law usually in the form of commentaries on the jurist Sabinus; general

commentaries on the Edict of the Praetor who was the elected official with control over the most important law courts; collections of their replies to legal questions, both hypothetical and real; monographs on particular legal subjects; and elementary textbooks. For the preparation of the *Digest* or *Pandects* Justinian ordered his quaestor, Tribonian, to have all the ancient books of authority read and the substance extracted. All superfluities were to be removed, as were obsolete rules and any that were already recorded in the *Code*. The task which the sixteen compilers completed in three years, although it is said that completion in ten was not thought possible, involved, according to Justinian, the reading of almost two thousand volumes. The compilers retained at the head of each extract the name of the author and the book in which it appeared. Justinian's instructions to his compilers and the prefaces issued on the completion of the undertaking appear at the beginning of this translation.

In the spring of 1978, the President of the Commonwealth Fund, Dr. Carleton B. Chapman, wrote to Alan Watson, Professor of Civil Law in the University of Edinburgh, and raised the question why there was no complete translation of the *Digest* into English, apart from the unsatisfactory one of S. P. Scott. Eventually, Alan Watson produced a proposal for a translation, the two met in New York in September, 1978, the proposal was approved by Carleton Chapman, and funding was generously provided by the Commonwealth Fund. By November 1978, Alan Watson had organized a team of translators who nearly completed their translation by the deadline of December 31, 1979. Each book, once translated, was sent to another scholar for revision; and the complete, revised translation was in the hands of Alan Watson by April 1980. Publication, again made possible through the generosity of the Commonwealth Fund, has taken longer.

From the outset, the director of the project enjoyed the enormous help of Mr. Grant McLeod as assistant director, who also prepared the glossary (with the assistance of Dr. Olivia Robinson). On Alan Watson's appointment to the University of Pennsylvania in September 1979, Professor J.A.C. Thomas of University College, London, assumed the post of assistant director which he retained until his death in June 1981. All who knew him will understand just how much energy and enthusiasm he injected into the project, and how much more difficult the task would have been without his never failing support. He translated and revised more books than anyone else. Another particularly tragic loss was Mr. Peter MacIntyre, assistant secretary of the University of Edinburgh, who was preparing an exceptionally detailed index. Without him, the index has had to be abandoned. The lack is serious, but the reader who is not a specialist in Roman law will easily find the *Digest* titles that are relevant to his studies. Then a reading of the appropriate pages in any of the standard textbooks will enable him to find the important *Digest* texts on the subject which are not cited in the obvious title.

The translators were as follows: preliminary matters, Dr. G. E. M. de Ste Croix; book one, Professor D. N. MacCormick; book two, Professor Geoffrey MacCormack; book three, Mr. Tom Kinsey; book four, Professor Geoffrey MacCormack; book five, Mr. Tom Kinsey; book six, Professor P. G. Stein; book seven, Mr. David Fergus; book eight, Mr. David Fergus; book nine, Dr. Colin Kolbert; book ten, Mr. Harry Hine; book eleven, Mr. Harry Hine; book twelve, Professor Peter Birks; book thirteen, Professor Peter Birks; book fourteen, Mr. Tony Weir; book fifteen, Mr. Tony Weir; book sixteen, Mr. R. Evans Jones; book seventeen, title one, Professor W. M. Gordon, Dr. Olivia Robinson, and Mr. David Fergus; book seventeen, title two, Dr. Peter Garnsey; book eighteen, Professor J. A. C. Thomas; book nineteen, Professor Bruce Frier; book twenty, Professor Tony Honoré; book twenty-one, Professor J. A. C. Thomas; book twenty-two, Professor A. M. Honoré; book twenty-three, Mr. Grant McLeod; book twenty-four, Mr. Grant McLeod; book twenty-five, Mr. Grant McLeod; book twenty-six, Dr. Susan Hart; book twenty-seven, Mr. Andrew Lewis; book twenty-eight, Professor W. M. Gordon; book twenty-nine, Professor W. M. Gordon; book thirty, Mr. Tom Braun; book thirty-one, Mr. Tom Braun; book thirty-two, Mr. Tom Braun; book thirty-

three, Mr. Robin Seager; book thirty-four, titles one through three, Dr. Shelagh Jameson; book thirty-four, titles four through nine, Mr. C. J. Tuplin; book thirty-five, Professor J. A. C. Thomas; book thirty-six, Mr. John L. Barton; book thirty-seven, Dr. Shelagh Jameson; book thirty-eight, Dr. Shelagh Jameson; book thirty-nine, Mr. C. J. Tuplin; book forty, Professor P. A. Brunt; book forty-one, Professor J. A. C. Thomas; book forty-two, Professor J. A. C. Thomas; book forty-three, Mr. Tom Braun; book forty-four, Professor Ben Beinart; book forty-five, Dr. Susan Hart, Mr. Andrew Lewis, and Professor Ben Beinart; book forty-six, Professor Ben Beinart; book forty-seven, Professor J. A. C. Thomas; book forty-eight, Dr. Olivia Robinson; book forty-nine, Dr. Olivia Robinson; book fifty, Dr. Michael Crawford.

With so many translators involved it was not thought possible or necessarily desirable to seek for consistency throughout the work. It was regarded as sufficient to have consistency within an individual book, hence that was the minimum unit ascribed to each translator. In addition some guidelines were produced: some Roman technical terms were to be translated always in the same prescribed way; others, where no English equivalent could be simply expressed, were to be left in Latin. The terms in the latter category are explained in the Glossary.

The facing Latin text is that of the great two volume edition of Theodor Mommsen, published in 1868 by Weidmann, Berlin. That was taken by the translators as the main text, but they could, and occasionally did, adopt any of the readings contained in the apparatus.

ALAN WATSON
Philadelphia,
October 1984

GLOSSARY

Abolitio. See Accusatio.

Acceptilatio (Formal Release). The method by which a creditor freed a debtor from his obligation under a verbal contract [*stipulatio* q.v.] producing the same effects as performance. *See D.*46.4.

Accessio (Accession). A general term for the acquisition of ownership by joining property to or merging it with something already owned by the acquirer. *See D.*41.1.

Accusatio (Accusation). The bringing of a criminal charge. Normally (exclusively until the early empire) this was left to the initiative of a private citizen acting as accuser [*delator*]. If a magistrate accepted the charge, he ordered its registration [*inscriptio*] on an official list. It could be removed from the list and so annulled [*absolutio*] during a public amnesty, or where the accuser withdrew the charge with the permission of the court. Unjustified withdrawal was a crime in itself [*tergiversatio*]. *See D.*48.2,16.

Actio Arbitraria. An action in which the judge could order the defendant to restore or produce the property at issue. If he failed to do so, the final judgment penalized him in various ways. *See D.*6.1.35.1; *D.*4.2.14.4.

Actio Civilis. See Ius Civile.

Actio Confessoria. See Servitus.

Actio Contraria. An action given to certain persons in particular legal situations where the normal direct action lay against them. *See* tutors [*tutor* q.v.] *D.* 27.4; depositees *D.*16.3; borrowers for use *D.*13.6.; creditors in the contract of *pignus* [q.v.] *D.*13.7.

Actio Famosa. See Infamia.

Actio in Factum. An action given originally by the *praetor* [q.v.] on the alleged facts of the case alone, where no standard civil law [*ius civile* q.v.] action was directly applicable. The expression *actio utilis* is also found, referring to a praetorian action which extended the scope of an existing civil law action, for example, by means of a fiction. The exact difference, if any, between this and the *actio in factum* is not known. *See D.*9.2.

Actio in Personam (Personal Action). An action based on an obligation of the defendant, whether this arose from a contract, delict, or other legal circumstance. Such an action lay only against the person under the obligation. Cf. *Actio in Rem.*

Actio in Rem (Real Action). An action asserting ownership of property, or other related though more limited rights over it, for example, a servitude [*servitus* q.v.]. Such an action lay against anyone withholding the property. Cf. *Actio in Personam.*

Actio Negatoria. See Servitus.

Actio Popularis. A penal action which could be brought by any person to protect the public interest in certain circumstances. The penalty was often paid to the complainant. *See D.*47.23.

Actio Praescriptis Verbis. An action given to a person after he had performed his part of the bargain under a contract which was not one of the standard types recognized by Roman law. *See D.*19.5.

Actio Utilis. See Actio in Factum.

Addictio in Diem. An agreement allowing a seller to set the sale aside if he received a better offer within a certain time. *See D.*18.2.

Ademptio (Ademption). The revocation, express or implied, of any disposition, usually a legacy. *See D.*34.4.

Adiudicatio (Adjudication). The order given by a judge [*iudex* q.v.] to settle certain proceedings between claimants over common property or between neighbors over boundaries. *See D.*10.2–3.

Adoptio (Adoption). A type of adoption where a dependent person [*alieni iuris* q.v.] was transferred from one family to another. This involved a change of *paterfamilias* [q.v.]. Adopted children were normally in the same legal position as natural children. Cf. *adrogatio* though the term *adoptio* is sometimes used to cover both. *See D.*1.7.

Adrogatio (Adrogation). A type of adoption where an independent person [*sui iuris* q.v.] joined a family, coming under parental power [*patria potestas* q.v.]. This could only be done to save a family from extinction and many restrictions were placed upon it. *See D.*1.7.

Adulterium (Adultery). This was made a criminal offense for a married woman by statute. Her husband was required to divorce and prosecute her, and her father could kill her and her partner with impunity in certain circumstances. *See D.*48.5.

Aedilis (Aedile). A magistrate of the republic whose duties were connected with the general management of daily life in the city, including some police work and the supervision of streets and markets. One type, the curule aediles, issued an edict [*edictum* q.v.] in connection with the latter which greatly influenced the law on sale and delictal liability for animals. The duties of the aediles were gradually taken over by the various types of prefect [*praefectus* q.v.] during the empire. *See D.*1.2.2.26; *D.*21.1.

Aestimatum. A transaction in which one person receives property from another on the basis that, within a specified time, he will either return the property or pay an agreed price. *See D.*19.3.

Agnatus (Agnate). A person related through the male line, whether by birth or adoption, to a common male ancestor. This is an important relationship throughout Roman law, especially in connection with the law of succession. Cf. also *paterfamilias.*

Alieni Iuris (Dependent). Subject to the legal power of someone else, either parental power [*patria potestas* q.v.] in the case of a son-in-power [*filiusfamilias* q.v.] and other descendants or the power of a master where slaves were concerned. Various legal disabilities were involved in either case. *See D.*1.6.

Aureus. See Solidus.

Bonae Fidei Iudicia (Actions of Good Faith). Certain contractual actions, for example, on sale, and certain quasi-contractual ones where the judge [*iudex* q.v.] had to take

account of what ought to be done or given in good faith (*bona fides*) by the parties. This gave the judge wide discretion as to the amount of damages he could award. He could also take account of any defense [*exceptio* q.v.] even where it had not been expressly stated by the defendant.

Bonorum Possessio. A type of possession granted originally by the *praetor* [q.v.] giving rise to an extended or sometimes alternative system of succession, both testate and intestate, to that provided by the civil law [*ius civile* q.v.]. It was protected by an *interdictum* [q.v.] and an action. *See D.*37.1.

Calumnia. (a) In private law, vexatious litigation or receiving money for this purpose. (b) In criminal law, the offense of maliciously or recklessly bringing a false criminal charge. *See D.*3.6.

Capitalis (Capital). A criminal matter where the penalty is death, loss of liberty, or loss of citizenship.

Capitis Deminutio (Change of Civil Status). A loss of or change in one or more of the three basic elements of civil status, that is, freedom, citizenship, and membership of a family. *See D.*4.5.

Castigatio (Corporal Punishment). This took a number of forms: *flagellatio* was generally a whipping for slaves; *fustigatio* was beating with a rod or club, mainly a military punishment; *verberatio* involved multiple lashes and seems to have been severe.

Cautio. (a) A guarantee, either real or personal, that certain duties will be fulfilled. (b) A written document providing evidence of a contract, usually *stipulatio* [q.v.].

Census (Census). A public register of citizens, which estimated their property holdings and so assigned them to the various social classes. *See D.*50.15.

Codex. A collection, official or unofficial, of imperial enactments rather than a complete statement of the law as in a modern "code." *See* preface.

Cognitio. (a) A type of civil procedure, often referred to as *extra ordinem*, signifying its distinctness from the Formulary System [*formula* q.v.] of classical times, which it replaced in the third century A.D. The main difference was that under the *Cognitio* System the whole proceedings took place before an imperial magistrate. (b) The term is also used in a more general way in administrative and crimnal proceedings to cover the competent area of a judicial inquiry, or the investigation itself.

Collatio Bonorum. A contribution in respect of prior gifts which was required of emancipated [*emancipatio* q.v.] children who wished to benefit by intestate succession to their father. *See D.*37.6.

Collegium (Association). Any association, public or private, for religious, professional, or other purposes. Legal restrictions were placed on such associations to prevent subversive activities. *See D.*47.22.

Compensatio (Set-Off). The reduction of any claim by taking into account the defendant's counterclaim based on another transaction. *See D.*16.2.

Concubinatus (Concubinage). A legally and socially recognized monogamous relationship short of marriage. *See D.*25.7.

Condictio. A type of action alleging a civil law [*ius civile* q.v.] debt without mentioning any cause of action, available not only as a contractual remedy, but also on a quasi-contractual basis, where unjustified enrichment could be shown. Although its form was always the same, its name varied according to the situation involved, for example, the *condictio* for money not due [*indebiti*], that is, money paid in error. *See D.*12.4–13.3.

Constitutio. The general word for imperial legislation of all kinds. *See D.*1.4.

Constitutum Debiti. A pact [*pactum* q.v.] consisting of an agreement to pay an existing debt, incurred by the party himself or some other person, at an agreed time. It gave rise to an *actio in factum* [q.v.] for half as much again as the original debt. *See D.*13.5.

Consul (Consul). The title of the two supreme magistrates of the republican constitution, elected annually. Consuls continued to be elected during the empire with various administrative and judicial powers, but the position became increasingly an honorary one until it was abolished by Justinian. *See D.*1.10.

Conubium. The right to contract a civil law [*ius civile* q.v.] marriage, possessed generally only by Roman citizens.

Crimem (Crime). This term can denote a criminal charge or criminal proceedings as well as the crime itself. *See D.*47.11.

Cura, Curatio (Care). These terms were applied to various institutions whereby the well-being and/or property of certain persons were legally safeguarded by someone else, a *curator.* The most important forms were care of a lunatic, of a spendthrift, and the guardianship of an independent [*sui iuris* q.v.] person who was a *minor* [q.v.]. *See D.*27.10; *D.*4.4.

Curator. See Cura.

Decurio (Decurion). A member of a municipal council. This body decided all local matters. During the later empire the office became more burdensome than desirable in many places. *See D.*50.2.

Defensor (Defender). A person who defends another's interests at a trial, often because of his legal relation to him, for example, as *tutor* [q.v.]. *See D.*3.3.

Delator. See Accusatio.

Delegatio. A form of novation [*novatio* q.v.] in which the alteration consisted of a change of the creditor or the debtor in relation to the other party. *See D.*46.2.

Deportatio (Deportation). The punishment of perpetual banishment. It was the most severe of kinds of banishment, since it involved confinement to a fixed place, confiscation of property, and loss of citizenship. *See D.*48.22.

Dies utiles. The days on which legal proceedings could be brought.

Divus (Deified). A title granted to an emperor after death if he had been officially consecrated as a state deity.

Edictum (Edict). A proclamation by a magistrate or the emperor. In the republic, the edicts which had the greatest effect on private law were those of the *praetores* [q.v.; see also *aedilis*]. Each praetor could issue a new edict for his year in office, setting out the actions he was prepared to allow, but in practice he took over much of the material from his predecessors. This led to the development of an almost standard body of rules known as the "Edict," containing the numerous praetorian extensions to the civil law [*ius civile* q.v.]. This process survived the transition to empire, but the Emperor Hadrian ordered the consolidation of the Edict early in the second century A.D.; thereafter it does not appear to have been a source of new law.

Emancipatio (Emancipation). Voluntary release from parental power [*patria potestas* q.v.], conferring independent [*sui iuris* q.v.] status. *See D.*1.7.

Emphyteusis. A real right over the property of another, consisting in a grant of land by the state or local authority on a long lease or in perpetuity for a groundrent. *See D.*6.3.

Exceptio (Defense). A defense, inserted originally in the *formula* [q.v.], which did not deny the prima facie validity of the claim, but adduced some circumstance which nullified it, for example, duress. There was a number of these defenses, each named after the fact they alleged, for example, the defense of fraud. *See D.*4.3.

Exheredatio (Disherison). The exclusion by a testator of his issue or other persons from taking benefit under his will. Many formal and material restrictions were placed upon such exclusion. *See D.*28.2.

Exilium (Exile). This term was often used to mean voluntary exile as well as involuntary banishment. Voluntary exile after, or to escape from, capital condemnation involved loss of citizenship and property as well as being made an outlaw.

Extraneus Heres. See Heres.

Extra Ordinem (Extraordinary). (a) In private law, this refers to the *Cognitio* System [*cognitio* q.v.] (b) In criminal law, it refers to proceedings other than those authorized for the *quaestiones perpetuae* [q.v.]. The criminal jurisdiction of, for example, the urban prefect [*praefectus* q.v.] was thus *extra ordinem. See D.*50.13.

Familia (Family). As well as a family in the modern sense this term sometimes also covers a person's whole household, including freedmen and slaves as well as relations. *See D.*50.16.195.

Fideicommissum. A charge in a will imposed on an heir or legatee to transfer property to someone else. *See D.*30–31.

Fideiussio (Verbal Guarantee). A verbal contract of personal guarantee, usually but not necessarily covering a principal debt contracted by *stipulatio* [q.v.], its form being a variant of that contract. *See D.*46.1.

Filiusfamilias (Son-in-Power). A son subject to the parental power [*patria potestas* q.v.] of the head of the household, the *paterfamilias* [q.v.]. He was subject to various disabilities, especially in the field of property, although his position was improved by the existence of the *peculium* [q.v.]. This subjection only applied in private law; in public law matters a son-in-power was in the same position as the head of the household.

Flagellatio. See Castigatio.

Formula. The Formulary System was a type of civil procedure introduced in the republic and continuing to operate until the third century A.D., though it was increasingly superseded and eventually replaced by the *Cognitio* [q.v.] System. However, many traces of it can still be found in the *Digest.* The procedure was controlled by the *praetor* [q.v.] who was required by the parties to frame a formal statement of the legal issues in the case, the *formula.* This was then passed on to a lay judge [*iudex* q.v.] for a hearing on the facts. Details of the various kinds of *formulae* available would be found in the Edict [*edictum* q.v.].

Fustigatio. See Castigatio.

Habitatio (Right of Habitation). The right to occupy a house for life. It was a personal servitude [*servitus* q.v.]. *See D.*7.8.

Heres (Heir). The person who inherits nearly all the rights and duties of the deceased by testate or intestate succession. There was a number of different kinds of heir. A *heres suus* was someone subject to the deceased's parental power [*patria potestas* q.v.] at the time of death; A *heres suus et necessarius* was such a person who became independent [*sui iuris* q.v.] by the death. This type of heir could not refuse the inheritance, as was also the case with the *heres necessarius*, a slave who was

manumitted [*manumissio* q.v.] for this purpose. An *extraneus heres* was someone not subject to the deceased's parental power at time of death, either being unrelated or, for example, emancipated [*emancipatio* q.v.]. A *heres legitimus* was a person who succeeded in accordance with the civil law [*ius civile* q.v.] rules on intestacy. *See D.*28.5.

Honestiores. See Humiliores.

Humiliores. Persons of low social status, in contrast to the upper classes, the *honestiores.* The main legal difference was that only the former were liable to certain kinds of punishment, for example, crucifixion, torture, and corporal punishment.

Hypotheca. A contract of pledge in which the creditor obtained neither ownership nor possession of the property pledged. *See D.*13.7.

Imperium (Authority). The power of the higher republican magistrates, including the *praetor* [q.v.], and later the emperor to issue orders and enforce them, in particular the right to administer justice and to give military commands.

Impubes. A person under the age of puberty, which was eventually fixed at twelve years of age for girls and fourteen for boys. Such persons lacked full legal capacity, and those who were independent [*sui iuris* q.v.] had to be in tutelage [*tutela* q.v.] *See D.*26.

Incola. A person domiciled in a city or community other than the one in which he was born. *See D.*50.1.

Infamia. A condition of disgrace resulting from certain types of immoral or wrongful conduct. It followed, for instance, on conviction for a crime, or condemnation in delictal actions and those involving breach of trust called *actiones famosae.* Many legal disabilities resulted from this condition. *See D.*3.2.

Infans. A child under the age at which rational speech was possible, later fixed at seven years old. Such persons were a type of *impubes* [q.v.] with few legal powers.

Inscriptio. See Accusatio.

Institor. See Procurator.

Interdictum (Interdict). An order issued originally by the *praetor* [q.v.] or other magistrate in an administrative capacity, giving rise to further proceedings if disregarded. Many interdicts in private law were concerned with the protection of possession against unlawful interference in various circumstances. At times, interdicts were a procedural device for awarding interim possession, the party who acquired this becoming the defendant in a subsequent action. But they were also for many other private law and also public law purposes, for example, the interdict from fire and water was a form of banishment pronounced on a voluntary exile [*exilium* q.v.]. The complicated procedure required under the Formulary System [*formula* q.v.] for the use of interdicts became obsolete under the *Cognitio* [q.v.] System, and they were replaced by ordinary actions, although the issues and much of the terminology of the older system remained. *See D.*43.

Iudex (Judge). In the private law Formulary System [*formula* q.v.], the judge was a private individual chosen by the parties to decide the case on its facts, the legal issues having already been defined by the *praetor* [q.v.]. Under the later *Cognitio* [q.v.] System and in public and criminal matters, the term was used of any imperial official with jurisdiction, for example, a provincial governor [*praeses* q.v.]. *See D.*2.1.

Ius Civile (Civil Law). The original basic rules, principles, and institutions of Roman law, deriving from the various kinds of statute [*lex, senatus consultum, constitutio*

qq.v.] and from juristic interpretation. They were applicable directly only to Roman citizens, but in 212 A.D. the *constitutio Antoniniana* conferred citizenship on most of the inhabitants of the empire. The expression is sometimes used in a more philosophical sense to mean the law peculiar to any community or people, whatever its source. Cf. *ius gentium* and *ius honorarium*. *See D.*1.1.

Ius Gentium. The original meaning of this term was probably the body of rules, principles, and institutions developed in the late republic to cover commercial dealings with peregrines [*peregrinus* q.v.] and other noncitizens, who could not use the civil law [*ius civile* q.v.]. Its development may be connected with the peregrine praetor [*praetor* q.v.]. Less formalistic and more sophisticated than the civil law, it came to have a more philosophical sense of the law which was common to all peoples and communities, although its detailed provisions were Roman in character and treated as ordinary rules of law. Cf. *ius civile*. *See D.*1.1.

Ius Honorarium (Praetorian Law). The law introduced by magistrates, especially the praetor [*praetor* q.v.] by means of his Edict [*edictum* q.v.], to aid, supplement, or correct the existing civil law [*ius civile* q.v.]. It provided a large number of remedies which were often preferable to the civil law ones, for example, in the field of succession. *See bonorum possessio*. In juristic writings it was commonly treated as distinct from the civil law, although both were simply parts of Roman law as a whole. Cf. *ius civile*.

Iusiurandum (Oath). Oaths were used in a number of contexts. (a) In general, a party could choose to swear an evidential oath before a judge [*iudex* q.v.]. But certain oaths were compulsory, for example, as to the value of the property claimed and that *calumnia* [q.v.] was absent. *See D.*12.2, 3. (b) In certain actions, the parties could challenge each other to swear oaths as to the validity of their cases. If the challenge was refused, the person refusing lost his case, bringing the trial to a speedy conclusion. This type of oath was called "necessary." *See D.*12.2. (c) In any action, a party could offer to swear or challenge the other party to swear to the validity of his case. The challenge need not be accepted, but if it was, an action or defense of oath was allowed in any subsequent proceedings. Here the oath was called "voluntary." *See D.*12.2. (d) An oath was required of a slave about to be manumitted [*manumissio* q.v.] that he would promise to perform certain services for his former master [*patronus* q.v.]. *See D.*38.1.7.

Ius Naturale (Natural Law). A vague expression in Roman law. At times it was merely a synonym for the term *ius gentium* [q.v.]. It often means that the rule or principle in question was thought of as based on everyday experience, referred to as "natural reason" [*naturalis ratio*]. Sometimes it refers to the justice or fairness of a rule, but the view of natural law as a universal ideal order in any way contrasted with positive law is almost entirely absent. *See D.*1.1.

Legatus (Legate). A term with a number of meanings. (a) An ambassador. Such a person on an imperial mission was called a *legatus Augusti (Caesaris)*. *See D.*50.7. (b) The deputy of a provincial governor [*proconsul* q.v.] with special delegated jurisdiction. *See D.*1.16. (c) A type of provincial governor was called a *legatus Augusti (Caesaris) pro praetore*. *See D.*1.18.1. (d) The commander of a legion.

Legitimus Heres. *See Heres*.

Lenocinium. *See Stuprum*.

Lex. (a) A statute passed by one of the popular assemblies of republican times. It normally took the gentile (middle) name of the proposer or proposers, the subject matter of the legislation sometimes also being indicated in the title, for example, the *Lex Cornelia* on Guarantors, the *Lex Fufia Caninia*. In the early empire some leg-

islation was passed in this way, but the practice was obsolete by the end of the first century A.D. Thereafter, *lex* is often used of any piece of imperial legislation. *See* *D.*1.3,4. (b) The term also occurs in connection with the *Twelve Tables* [*lex duodecim tabularum*], a collection of early rules traditionally dating from c. 450 B.C., and drawn up by ten commissioners, the *decemviri.* It is not extant, but there are many references to its supposed provisions in the *Digest* and other legal and literary sources. *See* *D.*1.2.4.–6. (c) A special clause in a contract, for example, the *lex commissoria,* which allowed a seller to call off the sale if the price was not paid by a certain time. *See* *D.*18.3.

Libertinus, Libertus (Freedman). A former slave who, on manumission [*manumissio* q.v.], became a freeman and a Roman citizen, though with extensive public law disabilities. He had many duties toward his former master, his patron [*patronus* q.v.]. An imperial freedman [*libertus Caesaris*] manumitted by the emperor, often obtained high governmental office in the early empire. *See* *D.*38.1–5.

Lictor (Lictor). An attendant of a higher magistrate with *imperium* [q.v.], whose main duty was to escort him during public appearances.

Maiestas. This term was applied to a number of criminal offenses including treason, sedition, and desertion. In the empire it covered any action which endangered the emperor or his family. The earlier crime of betrayal to an enemy, *perduellio,* was eventually held to be merely a way of committing this offense. *See* *D.*48.4.

Manumissio (Manumission). The release of a slave by his master during the latter's lifetime or in his will. *See* *D.*40.1–9.

Metallum (Mine). Condemnation to work in a mine was a capital punishment [*capitalis* q.v.] only slightly less serious than the death penalty. There was a milder form known as *opus metalli. See* *D.*48.19.

Minor. A person over the age of puberty [*impubes* q.v.] but under the age of twenty-five. Such persons who were independent [*sui iuris* q.v.] had in classical times full legal capacity, though they could be protected by a grant of *restitutio in integrum* [q.v.]. In later law, the development of the institution of *cura* [q.v.] gave them more protection but some disabilities. *See* *D.*4.4; *D.*26.7,8.

Missio in Possessionem. A remedy granted originally by the *praetor* [q.v.] allowing a person to take over in whole or in part the property of another with various legal results. It had many uses, for example, to protect a creditor's interest after judgment or where property was threatened by the ruinous state of that of a neighbor. *See* *D.*42.4; *D.*39.2.

Munera. Certain public services which every person was bound to perform on behalf of his community or state. Some services were personal, for example, tutelage [*tutela* q.v.], others were burdens on property. Certain taxes were included under this term, and money payments could often be made in lieu of actual labor, for example, in maintaining public roads. The grounds for exemption [*excusatio*] from most of these services were limited. *See* *D.*50.4.

Naturalis Ratio. See Ius Naturale.

Negotiorum Gestio (Unauthorized Administration). The performance of some service on behalf of another person, without his request or authorization. If the action was reasonable in the circumstances, there was an action for compensation. *See* *D.*3.5.

Novatio (Novation). The extinction of one or more obligations by replacing it or them with a new obligation in the form of a stipulation [*stipulatio* q.v.]. *See* *D.*46.2.

Noxae Dare (To Surrender Noxally). To hand over a slave or animal as compensation to the victim of a delict committed by him. This alternative was open to an owner only where there had been no complicity on his part in the delict. *See D.*9.1,4.

Obsequium. See Patronus.

Occupatio (Occupation). The acquisition of ownership by taking possession of a thing not previously owned, such as a wild animal, or a thing which has been abandoned by its owner. *See D.*41.1.

Opus Metalli. See Metallum.

Opus Publicum. Forced labor on public works. This criminal punishment could only be imposed on *humiliores* [q.v.]. Condemnation for life meant loss of citizenship, but lesser terms did not affect status. *See D.*48.19.

Oratio (Oration). A proposal put forward by the emperor for legislation by means of a *senatus consultum* [q.v.]. The approval of the senate became a mere formality, so that the term came to mean a piece of direct imperial legislation, a type of *constitutio* [q.v.].

Pactum (Pact). Any agreement which did not come within one of the recognized categories of contract. Such an agreement was not generally actionable, but was accepted as a defense [*exceptio* q.v.]. However, pacts added to a recognized contract in order to modify its normal obligations were enforceable, as were certain pacts unconnected with any contract, for example, *constitutum debiti* [q.v.]. *See D.*2.14.

Paterfamilias (Head of the Household). The oldest ascendant male agnate [*agnatus* q.v.] in any family was its legal head. He exercised considerable powers over his sons, daughters, and other descendants, that is, those dependent [*alieni iuris* q.v.] on him. They were subject to his control in many matters relating to their persons, for example, marriage, and were incapable of owning property. Apart from certain kinds of *peculium* [q.v.] and some special categories of property in later law, all they acquired passed to their *paterfamilias*. The powers of a *paterfamilias* did not cease when the person subject to them reached majority. Often the word "father" [*pater*] is used in this sense.

Patria Potestas (Parental Power). The power of a *paterfamilias* [q.v.] over those dependent [*alieni iuris* q.v.] on him. In private law, the expression "in power" [*in potestate*] refers either to someone subject to this or the power of master over his slave. *See D.*1.7.

Patronus (Patron). The former master of a slave, who after manumission [*manumissio* q.v.] has become his freedman [*libertus* q.v.]. A patron had many rights over his freedman, particularly with regard to the performance of certain agreed services [*opera*] and in connection with succession. A freedman had to show respect [*obsequium*] to his patron and could not bring criminal proceedings against him or actions involving *infamia* [q.v.]. *See D.*37.14,15; *D.*38.1–4.

Pauperies. Damage done by an animal, without fault on the part of its owner. An action was given for the value of the damage done with the alternative of noxal surrender [*noxae dare* q.v.]. *See D.*9.1.

Peculatus. The misappropriation of public money or property by theft, embezzlement, or any other means. *See D.*48.13.

Peculium. The sum of money or property granted by the head of the household [*paterfamilias* q.v.] to a slave or son-in-power [*filiusfamilias* q.v.] for his own use. Although considered for some purposes as a separate unit, and so allowing a business run by slaves to be used almost as a limited company, it remained technically the

property of the head of the household. From the early empire onward, special kinds of *peculium* came into existence, the "military" [*castrense*] and the "quasi-military" [*quasi castrense*] *peculium*, which were considered for many legal purposes to be the property of a son-in-power himself. *See D.*15.1; *D.*49.17.

Perduellio. See Maiestas.

Peregrinus (Peregrine). In classical times this term usually meant a member of a non-Roman community within the empire, who was subject to the law of his own state and had few of the public or private law rights of a Roman citizen, for example, *conubium* [q.v.]. A special *praetor* [q.v.] dealt with peregrines' transactions. After the *constitutio Antoniniana* [*see ius civile*], the expression came to be applied to foreigners living outside of the empire.

Pignus. A contract of pledge under which the creditor obtained possession of the property pledged, but ownership remained with the debtor. The expression was sometimes used as a general one for any form of real security, including *pignus* and *hypotheca* [q.v.]. *See D.*13.7.

Pollicitatio (Unilateral Promise). A promise made to city or community to make a gift of money or to erect a public building or monument. Such a promise was legally binding in most cases as a matter of public law. *See D.*50.12.

Postliminium. The regaining of most of a person's private and public law rights on returning from capture by the enemy. The main exception in classical law was that a marriage usually did not automatically revive. *See D.*49.15.

Potestas. See Patria Potestas.

Praefectus (Prefect). The title of various kinds of high officials and military commanders in the empire. The most important of these were the praetorian prefects [*praefecti praetorio*], the chief military and civil advisors of the emperor and governors of the four great prefectures into which the later empire was divided. They also had extensive private law and (from the the third century A.D.) criminal law jurisdiction, the courts over which they presided being the highest in the empire. But the two urban prefects [*praefecti urbi*], one at Rome and later one at Constantinople, exercised independent criminal and civil jursidiction over their respective territories. Many of the lesser prefects in charge, for example, of the corn supply [*praefectus annonae*] or the city guard [*praefectus vigilum*], served under the urban prefect and their legal decisions could be appealed to him. The prefect of Egypt [*praefectus Augustalis* or *Aegypti*] was in a special position in a number of ways. *See D.*1.11,12,15,17.

Praelegare. To make a legacy of a specific thing to an heir [*heres* q.v.] in addition to his share of the inheritance.

Praeses (Governor). The general name for any provincial governor, who had judicial as well as administrative powers. *See D.*1.18.

Praetor (Praetor). In the republic, an important magistrate second only to the *consules* [q.v.], in charge of the administration of private law. As well as the urban praetor [*praetor urbanus*], probably the most important, there was also a peregrine praetor [*praetor peregrinus*] dealing with foreigners [*peregrinus* q.v.] and later there were a number of other judicial praetors dealing with specific issues [for example, *fideicommissum* q.v.]. However, because of the growth of a standard body of praetorian law [*ius honorarium* q.v.] leading to the consolidation of the Edict [*edictum* q.v.], these officials are referred to collectively in the texts as "the praetor." The praetor greatly extended and modified the civil law [*ius civile* q.v.] by means of his control over the Formulary System [*formula* q.v.] of civil litigation. Praetors continued to be appointed during the empire, but gradually their legal

functions were taken over by other officials such as the various kinds of prefect [*praefectus* q.v.] and the office became largely honorary. *See D.*1.2.27–34; *D.*1.14.

Praevaricatio. Collusion between the accuser [*accusatio* q.v.] and accused in a criminal trial to secure acquittal, or between a lawyer and his client's enemy. *See D.*47.15.

Precarium. A grant of the possession and general use of property made gratuitously and revocable at any time. *See D.*43.26.

Proconsul (Proconsul). A kind of provincial governor with civil and criminal jurisdiction. *See D.*1.16.

Procurator (Procurator). This term has a number of meanings. (a) The representative of a party in a civil trial. (b) A general manager of another person's business or other affairs. This position was often given to a freedman [*libertinus* q.v.] or a slave. Occasionally, the term was applied to an agent for a single transaction. An earlier type of business manager [*institor*] came to be considered a kind of procurator. *See D.*3.3; *D.*14.3. (c) Many imperial officials were called procurators, for example, a *procurator Caesaris*, originally a fiscal agent but later given many administrative duties. *See D.*1.19.

Quaestiones Perpetuae. Permanent criminal courts, each dealing with one class of offense, the penalty for it being fixed by the relevant statute [*lex* q.v.], which also usually set up the court itself. They had large juries, from whose verdict there was no appeal. The *Cognitio* [q.v.] System was sometimes an alternative. *See D.*48.18.

Quaestor (Quaestor). A magistrate whose office was created in the republic, whose duties were mainly connected with public finances and provincial administration. Their importance declined during the empire. *See D.*1.13.

Rei Vindicatio. See Vindicatio.

Relegatio (Relegation). A form of banishment either for a fixed period or in perpetuity. It did not necessarily involve loss of citizenship or confiscation of property, but merely exclusion from a specified territory. *See D.*48.22.

Repetundae. Extortion or unlawful acquisition of money or property by a person in an official position, such as a provincial governor. *See D.*48.11.

Rescriptum (Rescript). A written answer, issued by the imperial civil service on behalf of the emperor, to legal and administrative questions. These were sent in by officials and private individuals. In principle, such decisions were only binding in the case at issue, but they often came to be considered as of general application.

Restitutio in Integrum. A remedy granted originally by the *praetor* [q.v.] annulling the normal civil law [*ius civile* q.v.] effect of some event or transaction which had unfairly prejudiced a person's position. It had many uses as a remedy against fraud, or even, in the case of a *minor* [q.v.], a bad bargain in certain circumstances. *See D.*4.1,2,3,6.

Senator (Senator). A member of the senate [*senatus*], the most important assembly of the republic, with enormous and undefined advisory, deliberative, judicial, and later legislative powers [*senatus consultum* q.v.]. It was largely composed of ex-magistrates. During the empire the political importance of the senate declined, but senators and their families were considered to belong to the privileged senatorian class [*ordo senatorius*]. But certain legal disabilities were also involved, for example, marriage with a freedman [*libertus* q.v.] or woman was prohibited. *See D.*1.9.

Senatus Consultum. A decision of the senate [*senator* q.v.], which during the republic technically took the form of advice to a high magistrate, for example, the

praetor [q.v.], who would then normally incorporate it in a statute [*lex* q.v.] or the Edict [*edictum* q.v.]. In the early empire, these decisions came themselves to have legislative force. But the increasing role of the emperor in the proceedings [*oratio* q.v.] and the rise of other forms of imperial legislation [*constitutio* q.v.] gradually made the process and its name obsolete. *See D.*1.3.

Servitus (Servitude). A right exercised over property belonging to another. When attached to land or a building for the benefit of whoever owned it, for example, a person's right of way across land adjacent to his own, it was called a praedial [*praediorum*] servitude. Where the right was for the benefit of a particular person, for example, *usufructus* [q.v.], it was called a personal [*personarum*] servitude in later law. The holder of the servitude had an *actio in rem* [q.v.] to assert his rights, called an *actio confessoria.* A person denying that a servitude existed over his property had an action called an *actio negatoria* or *negativa* for this purpose. *See D.*7, *D.*8.

Servus Poenae. A person condemned to slavery as a punishment for a crime, including someone awaiting the death penalty. He was not considered to have a master, and could never be manumitted [*manumissio* q.v.].

Solidus or *Aureus* (Gold Piece). The standard gold coin of the later empire, used in the *Digest* to express any actual sum of money mentioned in the texts.

Statuliber. A slave whose manumission [*manumissio* q.v.] under a will was subject to some condition not yet fulfilled. *See D.*40.7.

Stipulatio (Stipulation). A unilateral verbal contract, concluded, in its original form, by a formal question put by the creditor to the debtor and his answer to it, for example, "Do you solemnly promise that one hundred gold pieces will be given to me?" "I solemnly promise." Any kind of obligation could be expressed in this form, and existing obligations could be reduced to it by novation [*novatio* q.v.], making it perhaps the most common type of Roman contract. No witnesses were required, but it became the usual practice to record the stipulation in writing [*cautio* q.v.]. This was never legally necessary, and the question of whether the *cautio* was considered probative in later law is disputed. The appropriate action on a stipulation was usually a *condictio* [q.v.], although for some purposes there was an *actio ex stipulatu. See D.*45.1.

Stuprum. This term covered a range of sexual offenses from illicit intercourse with a respectable unmarried woman or widow to homosexual rape.

Substitutio (Substitution). The appointment of another heir [*heres* q.v.] or heirs to cover the possibility that the one first instituted might not or could not accept the inheritance, which would make the will void. *See D.*28.6.

Sui Iuris (Independent). Free from the parental power [*patria potestas* q.v.] of another. Where such a person was an *impubes* [q.v.], he would be subject to tutelage [*tutela* q.v.]. In later law, if a *minor* [q.v.], he would be in care [*cura* q.v.].

Superficies. The right to the surface of land belonging to another, originally only a public body, for building or other purposes in return for a rent. *See D.*43.18.

Supplicium Ultimum. An aggravated form of the death penalty, for example, by crucifixion or being thrown to wild beasts. *See D.*48.19.

Suus et Necessarius Heres. See Heres.

Suus Heres. See Heres.

Tergiversatio. See Accusatio.

Testamenti Factio. The right to make, take under, or witness a Roman will. *See D.*28.1.

Transactio. The compromise of legal proceedings, actual or contemplated, in return for payment or other consideration. *See D.*2.15.

Tutela (Tutelage). A form of guardianship over the person and property of an *impubes* [q.v.] exercised by a tutor appointed in various ways. The powers of the tutor varied according to the age of the child, being greater when he was an *infans* [q.v.]. The tutor was accountable at the end of his period in office, that is, when his ward reached puberty. It was considered a public duty [*munera* q.v.], though many exemptions from it were recognized. *See D.*26, *D.*27.

Tutor. See Tutela.

Twelve Tables. See Lex.

Usucapio (Usucapion). The acquisition of ownership by possession of property for a specified period of time and under certain conditions, for example, that the possession was in good faith. *See D.*41.3.

Usufructus (Usufruct). The right to use the property of another and take its fruits or profits [*fructus*] without diminishing its capital value. It was a personal servitude [*servitus* q.v.]. *See D.*7.1–6,9.

Usus (Right of Use). The right to use the property of another without taking its fruits or profits. It was a personal servitude [*servitus* q.v.]. *See D.*7.8.

Verberatio. See Castigatio.

Vicarius. (a) In private law, a substitute for another person or an underslave, a slave who is part of the *peculium* [q.v.] of another slave. (b) In public law, many kinds of deputy were given this name, as well as certain provincial governors of the late empire.

Vindicatio. A term commonly used for the action claiming ownership of property, its full title being *rei vindicatio.* It was sometimes also used to cover other kinds of mainly real actions [*actio in rem* q.v.]. *See D.*6.1.

Vis (Force). This expression has two different meanings: (a) In private law, it covered any action which might provoke fear [*metus*] in another, whether involving actual violence or not. Many of the interdicts [*interdictum* q.v.] of the *praetor* [q.v.] dealt with this matter. (b) In criminal law, it meant various kinds of violent assault and public disturbance, although it was also applied to certain offenses committed by officials. *See D.*4.2., *D.*43.16.

HEADINGS / TITLES

OF THE ESSENTIAL LAW OF THE COMPLETE

DIGEST OR *ENCYCLOPAEDIA*,

EXTRACTED FROM THE WHOLE OF THE ANCIENT LAW

BY THE

AUTHORITY OF OUR MOST SACRED

LORD JUSTINIAN AUGUSTUS

Here the Latin text gives a complete list of the titles in the *Digest*. Because these are identical (except for slight variations in opening rubrics) to the list of titles in the Table of Contents to the present volumes, they are omitted in the paperback edition.

THE COMPOSITION OF THE *DIGEST*

THE EMPEROR CAESAR FLAVIUS JUSTINIANUS, PIOUS, FORTUNATE, RENOWNED, CONQUEROR AND TRIUMPHER, EVER AUGUSTUS, GREETS TRIBONIAN HIS QUAESTOR.

Governing under the authority of God our empire which was delivered to us by the Heavenly Majesty, we both conduct wars successfully and render peace honorable, and we uphold the condition of the state. We so lift up our minds toward the help of the omnipotent God that we do not place our trust in weapons or our soldiers or our military leaders or our own talents, but we rest all our hopes in the providence of the Supreme Trinity alone, from whence the elements of the whole world proceeded and their disposition throughout the universe was derived. 1. Whereas, then, nothing in any sphere is found so worthy of study as the authority of law, which sets in good order affairs both divine and human and casts out all injustice, yet we have found the whole extent of our laws which has come down from the foundation of the city of Rome and the days of Romulus to be so confused that it extends to an inordinate length and is beyond the comprehension of any human nature. It has been our primary endeavor to make a beginning with the most revered emperors of earlier times, to free their *constitutiones* (enactments) from faults and set them out in a clear fashion, so that they might be collected together in one *Codex*, and that they might afford to all mankind the ready protection of their own integrity, purged of all unnecessary repetition and most harmful disagreement. 2. This work has been accomplished and collected in a single volume under our own glorious name. In our haste to extricate ourselves from minor and more trivial affairs and attain to a completely full revision of the law, and to collect and amend the whole set of Roman ordinances and present the diverse books of so many authors in a single volume (a thing which no one has dared to expect or to desire), the task appeared to us most difficult, indeed impossible. Nevertheless, with our hands stretched up to heaven, and imploring eternal aid, we stored up this task too in our mind, relying upon God, who in the magnitude of his goodness is able to sanction and to consummate achievements that are utterly beyond hope. 3. Mindful as we are of the supreme service of your sincerity, we committed this work also to you in the first place, as you have given proofs of your ability in the composition of our

Codex; and we commanded you to select as colleagues in your task those whom you thought fit, both from the most eloquent professors and from the most able of the robed men of the highest lawcourt. These men have now been brought together, introduced into the palace, and accepted by us on your recommendation; and we have entrusted to them the execution of the entire task, on the understanding that the whole enterprise will be carried out under your own most vigilant supervision. 4. We therefore command you to read and work upon the books dealing with Roman law, written by those learned men of old to whom the most revered emperors gave authority to compose and interpret the laws, so that the whole substance may be extracted from them, all repetition and discrepancy being as far as possible removed, and out of them one single work may be compiled, which will suffice in place of them all. Others too have written books dealing with the law whose writings have not been received or used by any later authors; but we do not regard these works as being worthy of intruding upon our ordinance. 5. Since this material will have been composed by the supreme indulgence of the Deity, it is necessary to set it out in a most handsome work, consecrating as it were a fitting and most holy temple of justice, and to distribute the whole law into fifty books and distinct titles, in imitation both of our *Codex* of *constitutiones* (enactments) and of the Perpetual Edict, in such a way as may seem convenient to you, so that nothing may be capable of being left outside the finished work already mentioned, but that in these fifty books the entire ancient law—in a state of confusion for almost fourteen hundred years, and rectified by us—may be as if defended by a wall and leave nothing outside itself. All legal writers will have equal weight and no superior authority will be preserved for any author, since not all are regarded as either better or worse in all respects, but only some in particular respects. 6. Out of a large number of authors, you must not make a judgment that the work of one is better and more equitable, since it may happen that the opinion of one writer, perhaps of inferior merit, is better at some point than those of many other authors, even superior ones. You ought not to reject out of hand, therefore, opinions recorded in the notes to Aemilius Papinian taken from Ulpian, Paul, and Marcian, which once had no weight on account of the honor given to the most renowned Papinian; but if you perceive that anything taken from them is necessary to supplement or interpret the works of Papinian, that man of supreme ability, you must not hesitate to set this down too as having the force of law, so that all the most gifted authors whose work is contained in this book may have as much authority as if their studies were derived from imperial *constitutiones* (enactments) and had been uttered by our own inspired mouth; for we ascribe everything to ourselves, since it is from us that all their authority is derived; and one who amends something that is not done accurately deserves more praise than the original author. 7. There is something else of which we wish you to take special account: If you find anything in the old books that is not well expressed, or anything superfluous or wanting in finish, you should get rid of unnecessary prolixity, make up what is deficient, and present the whole in proportion and in the most elegant form possible. What is more, if you find anything not correctly ex-

pressed in the old laws or *constitutiones* (enactments) which the ancient writers quoted in their books, you should also take care to rectify it and put it into proper form, so that what is chosen by you and set down there may be deemed genuine and the best version and be treated as if it were what was originally written; and let no one dare to assert that your version is faulty by comparison with the old text. Since by an ancient ordinance, the so-called *lex regia*, all legal capacity and all the power of the Roman people were transferred to the imperial authority, and we do not portion out our total sway among such and such partial sources but wish it to be wholly our own, how can ancient times detract from our legislation? We also wish that all the same rules, when they have been set out, are to be so fully in force that even if anything was expressed in one way in the old writers but appears in a contrary sense in our work, no fault should be found with the latter, but it should be ascribed to our own choice. 8. Consequently, in all parts of our aforesaid work there is to be no place for any antinomy (as it is called, from old times, by a Greek word),[1] but there is to be total concord, total consistency, with no one raising any opposition. 9. Repetition, too, as already said, we wish to exclude from a composition such as this. Seeing that the sanction of imperial *constitutiones* (enactments) is enough to give them their own authority, we do not wish those things which have been provided by the most sacred *constitutiones* (enactments) inserted in our *Codex* to be set out again from the old law, unless perhaps this should happen by way of logical distinction or supplementation or in an effort toward greater completeness; but even then this must be done very rarely, lest, by extension of this sort of failing, some thorny growth may arise in such a meadow. 10. Again, if any laws included in the old books have by now fallen into disuse, we by no means allow you to set them down, since we wish only those rules to remain valid which have either had effect in the regular course of the judicature or which the long-established custom of this generous city has sanctioned, in accordance with the text by Salvius Julian, pointing out that all *civitates* (states) ought to follow the custom of Rome, the very head of the world, and not Rome that of other *civitates* (states). And by Rome we must understand not only the old city but also our royal one,[2] which, with the favor of God, was founded with the best auguries. 11. We therefore command that everything is to be regulated by these two works: the *Codex* of *constitutiones* (enactments), and the other of the law clarified and arranged in the book that is to be. There may be added something else promulgated by us, serving the purpose of *Institutes*, so that the immature mind of the student, nourished on simple things, may be the more easily brought to knowledge of the higher learning. 12. We command that our complete work, which is to be composed by you with God's approval, is to bear the name of the *Digest* or *Encyclopaedia*. No skilled lawyers are to

1. The Greek word is ἀντινομία.
2. Constantinople.

presume in the future to supply commentaries thereon and confuse with their own verbosity the brevity of the aforesaid work, in the way that was done in former times, when by the conflicting opinions of expositors the whole of the law was virtually thrown into confusion. Let it suffice to make some reminders by indexes alone and simple headings, in such a way that no offense arises through interpretation. 13. Moreover, lest some ambiguity should arise in future from the writing itself, we command that the text of the same book is not to be written with deceptive coded signs and obscure abridgements, which by themselves and their defects have occasioned many antinomies, even where it is the number of the books or something similar that is signified: we do not allow even such things to be specified by peculiar signs in code; they must be set forth by an ordinary sequence of letters. 14. All this, therefore, your wisdom, with the favor of God, must strive to accomplish, together with the other most able men, and bring it to a satisfactory end as speedily as possible, in order that the complete work, divided into fifty books, may be offered to us in complete and eternal memory of the undertaking, and as a proof of the providence of Almighty God and for the glory of our rule and of your service. Given at Constantinople, on the eighteenth day before the Kalends of January, when Lampadius and Orestes, *viri clarissimi*, were consuls.[3]

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3. The date is 15 December 530.

THE WHOLE BODY OF LAW *

THE EMPEROR CAESAR FLAVIUS JUSTINIANUS, ALAMANNICUS GOTTHICUS FRANCICUS GERMANICUS ANTICUS ALANICUS VANDALICUS AFRICANUS, PIOUS, FORTUNATE, RENOWNED, VICTOR AND TRIUMPHER, EVER AUGUSTUS, GREETS THEOPHILUS, DOROTHEUS, THEODORUS, ISIDORUS AND ANATOLIUS, AND THALELAEUS AND CRATINUS, *VIRI ILLUSTRES*, PROFESSORS, AND SALAMINIUS, MOST ELOQUENT MAN, PROFESSOR.

That the whole body of law of our state has now been reformed and arranged, partly in four books of the *Institutes* or *Elements*, partly in fifty of the *Digest* or *Encyclopaedia*, and partly in twelve of the imperial *constitutiones*[1]—who knows this better than you do? Everything, indeed, which had to be either ordered at the outset or explained after the completion of the work, with a glad acknowledgment of what was done, has now been set forth by means of our discourses, made both in the Greek language and in that of the Romans: These we wish to be made to endure for ever. You, the appointed professors of legal knowledge, ought also to know what it is that we think necessary to be handed on to students and at what times, so that they may be made most competent and most learned. Therefore, we think that the present imperial discourse ought to be addressed to you particularly, so that your wisdoms, and also other professors who may choose to practice the same art in future times, may be able, by observing our rules, to tread the illustrious path of legal erudition. It is doubtless necessary, indeed, that *Institutes* should claim the first place in all studies, providing as they do the first steps in every branch of knowledge within a moderate compass. Now of the fifty books of our *Digest*, we hold the opinion that thirty-six alone suffice both for your exposition and for the instruction of the young. And this seems to us the proper time to make clear the order and the methods to be followed, to remind you of the things you used to transmit in former times, and to point out both the usefulness and the seasonableness of our new composition, so that nothing may be left unknown of this type of skill. 1. Earlier, indeed, as your wisdoms are aware, out of all the great multitude of legal writings, extending to two thousand books and three million lines, students, on the advice of their teachers, made use of no more than six books, and those confused and very rarely containing laws of practical use; the other books had gone out of use and become inaccessible to everyone. These six books included the *Institutes* of our own Gaius, and four separate books: the first on the old law relating to a wife's property, the second on tutelages, and the third and fourth on wills and legacies; and even these they did not use as a whole and in order, but passed by many parts of them as if superfluous. To students reading in their first year this work was not given according to the order observed in the Perpetual Edict, but haphazard

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*The Latin page carries no title.

1. This is the work known as the *Codex* of Justinian.

and put together as if at random, with the profitable and the unprofitable mixed up together, the greater share being given to the unprofitable. In the second year the order adopted was perverse: They were given the first part of the law with particular topics left out, although it was irregular to read, after the *Institutes*, anything else than what is placed first in the laws and deserves to be called the first part. After the reading of this material—not continuously but in a selection, and that mostly made up of unprofitable pieces—other topics were put before them, partly from that branch of the law which is called Legal Proceedings (these too not dealt with continuously, but affording a meager list of practical points, with all the rest of the book treated as useless), and partly from that branch which is called Things, consisting of seven books, in which also many parts were inaccessible to the students, being regarded as unsuitable and not very well adapted for educational purposes. In the third year they handled whatever they had not treated in the second year from both volumes (Things, and Legal Proceedings), used alternately; and the way was now opened for them to that most exalted man Papinian and his *Replies*; but out of the whole extent of those *Replies*, extending to nineteen books, they received only eight books, and not even the whole contents of those were handed to them, but only a few very short extracts out of many extensive ones, so that they had to abandon the work with their thirst unquenched. As this was all that was given them by their professors, the students used to read the *Replies* of Paul by themselves—not that they read them as a whole, but proceeding on an incomplete course lacking in logical connection, in the way prescribed by a bad custom. Until the fourth year, that was all the students acquired of ancient jurisprudence; and if anyone wishes to make a list of the things they read, he will find, on making a reckoning, that out of so great a multitude of legal writings they read through scarcely sixty thousand lines on their subject, all the rest being left aside and unknown and only held worthy of attention to some very small extent when either the course of legal process made it obligatory or you teachers of the law yourselves made a point of reading them, so that you might have something more complete in the way of knowledge than that of your pupils. This, then, is the record of the method of education in former times, according to what is confirmed by your own testimony.
2. We, however, on discovering this great deficiency in the [knowledge of] law, and deeming it a most unhappy state of affairs, are opening up to those who desire them the treasures of the law, by means of which, when your wisdoms have to some extent displayed them, your pupils may become the best endowed legal pleaders. In the first year they must absorb our *Institutes*, shaped from almost the whole body of ancient Institutes and channeled from all their muddy sources into one pure reservoir by the agency of Tribonian, that glorious man, *magister* and ex-quaestor of our sacred palace and ex-consul, and also two of your number: Theophilus and Dorotheus, most eloquent professors. For the rest of the year, in accordance with the best principle of arrangement, we prescribe that the students be given the first portion of the law, which is called by the Greek word *prōta* (first), there being nothing anterior to this, since what is first cannot have anything else before it. This, we decree, is to be for them the beginning and the end of the first year's education. We do not wish those who participate in it to be called by the absurd and ridiculous old name of "two-pounders"; they are to be known as "New Justinians," and we wish this to hold good for all future time, so that those who, while still unlearned, aspire to legal knowledge and have chosen to accept the rules laid down for the earlier year, may acquire our name, seeing that the first book, published by our authority, is to be given to them at once. The nickname they used to bear was justified by the ancient state of confusion of the laws, but now

that the laws are clearly and distinctly set out, in such a way as to be easily conveyed to their minds, it seems necessary that they should be distinguished by a different nickname. 3. In the second year, for which a name has already been given them by an edict and approved by us, we prescribe that they are to take either the seven books on Legal Proceedings or the eight on Things, according as the allocation of time allows, which we wish to remain untouched. They must accept the same books, on Legal Proceedings or on Things, as a whole and in their own order, nothing at all being left out of them, since everything is invested with a new elegance, and nothing at all unprofitable or obsolete is found in them. To whichever of these two books is chosen, Legal Proceedings or Things, we wish to be added for the second year's course four works in one book each, which we have chosen out of the whole compilation of fourteen books: One is taken from the collection in three books compiled by us on the subject of Dowries; one from the two books on Tutelages and Cares; one from the work in two books on Wills; and again, in the same way, one only from the seven books on Legacies and *Fideicommissa* and subjects connected therewith. We, therefore, ordain that these four books, which have been placed at the beginning of the aforesaid individual works, are to be the only ones given to the students by you; the remaining ten must be reserved for a convenient occasion, as it is not possible—and indeed, the second year is too short a time—for the study of those fourteen books to be instilled into the students by their teacher's instruction. 4. Next, the teaching of the third year is to conform to the following course. Whether the students happen to read the book on Legal Proceedings or that on Things, they must take at the same time a threefold arrangement of books on law, each on one subject. First, there is to be one separate book on the Action on a Mortgage; this we have put in a convenient place, where we deal with *hypotheca*, so that, competing as it does with actions on *pignus* (which are found in the books on Things), it may not be out of place in their company, both of them dealing with much the same subject. After this same separate book, another similar one is to be put before the students, which we have composed on the Edict of the Aediles, on the Action for Rescission, on *Evictiones*, and on the Stipulation for Double the Price; for although legal provisions concerning purchases and sales are conspicuous in the books on Things, all the definitions, as we have called them, have been placed in the last part of the Edict just mentioned, and hence we were obliged to transfer them to an earlier position, lest they should stray away farther from the neighborhood of sales, to which they are, so to speak, subservient. These three books we have joined with the study of that most acute man, Papinian, whose works students used to read in their third year, although they did not concern themselves with the whole body of his work but, here as before, only with a few passages selected out of many. To you, however, that excellent man Papinian himself will be available for reading, not only in his *Replies* composed in nineteen books, but also in the thirty-seven books of *Questions* and the two books of *Definitions*, also the book on *Adulteries*, and virtually all his exposition throughout the whole array of our *Digest*, in which he shines out in his own special portions. Lest the third-year students, whom people call Papinianists, should seem to be deprived of his name and his graceful style, he has been introduced again in the third year by a most ingenious device; for we have filled the book on *hypotheca* from the very beginning with passages from the same excellent Papinian, so that the students may take their name from him and be called Papinianists and may rejoice in remembering him and may observe the festal day which they used to celebrate when they first became acquainted with his legal rulings; and that the memory of Papinian, that most exalted former prefect, may abide in this way for ever, and the course of study for the third year may therewith close. 5. Because it is the custom for stu-

dents in their fourth year to be referred to conventionally by the Greek word *lytai*, let them keep this nickname, if they prefer it; but instead of the *Replies* of the most learned Paul, of which at one time they used to study barely eighteen books out of the twenty-three, reading them in the confused way already mentioned, let it now be their purpose to read attentively the ten separate books which remain out of the fourteen that we have described above; from these they will acquire a store of knowledge far larger and fuller than they used to get from the *Replies* of Paul. Thus, the whole succession of individual books compiled by us and divided into seventeen will be implanted in their minds (such as we have set it down in two parts of the *Digest*, namely the fourth and fifth, according to the division into seven parts),[2] and what we wrote at the beginning of our discourse will be found to be true: that by reading thirty-six books the young may become completely accomplished and equipped for every legal activity and not unworthy of our age. Two other parts of the *Digest*, that is to say, the sixth and seventh, arranged in fourteen books, must be put on one side, so that the students can read them later on and display their knowledge of them in court. If they imbue themselves well with these and strive to read and thoroughly understand the *Codex* of *constitutiones* (enactments) during the course of their fifth year, during which they are called *prolytai*, they will lack for nothing in legal knowledge, but will embrace the whole of it from beginning to end in their minds; and this single branch of knowledge, issuing from us at the present time, will achieve an admirable perfection, a thing which has happened in almost none of the other branches of learning, the number of which is infinite, however worthless some may be. 6. The students are to have nothing concealed from them, therefore, when these arcane matters have been revealed to them; and after perusing all the works we have composed through the agency of the eminent Tribonian and the others, they will prove themselves to be leading orators and servants of justice; in legal process they will be equally supreme as advocates and judges, successful everywhere and at all times. 7. We desire these three works which we have composed to be handed to students, as ordered now and by previous emperors, only in the royal cities and in the most excellent *civitas* of Berytus, which might well be called the nurse of the law, and not in other places which have earned no such privilege from our predecessors. We say this because we have heard that even in the most splendid *civitas* of Alexandria and in that of Caesarea and others there are unqualified men who take an unauthorized course and impart a spurious erudition to their pupils; we warn them off these endeavors, under the threat that if they should dare to perpetrate such deeds in future and act in this way outside the royal cities and the metropolitan city of Berytus, they are to be punished by a fine of ten pounds of gold and be driven from the *civitas* in which they commit a crime against the law instead of teaching it. 8. We now make a useful provision which in fact we laid down both in the discourse we delivered at the beginning of this undertaking and in another *constitutio* (enactment) issued by our majesty after its completion: that none of those who write books is to dare to include coded signs in them and, by means of abbreviations, introduce important discrepancies into the very interpretation or exposition of the law. All secretaries who do this in future must know that in addition to paying the criminal penalty they will be compelled to pay twice the value of the book to its owner, if he received it from them innocently—although even the man who purchased it will hold it as a thing of no value, since no judge will allow anything to be quoted from such a book but will order it to be treated as nonexistent. 9. Next we make a necessary order, with a very strong threat, that none of those who are engaged in legal studies, either in this most renowned *civitas* (city) or in the excellent town of

2. See the *Constitutio Tanta*, §§2–8c (below).

Berytus, is to perpetrate unworthy and most harmful—or rather, servile—jokes (the commission of which is a wrongful act) and other crimes, against either the professors themselves or their colleagues, and especially against those who are coming to study law without experience. Who indeed would call those things "jokes" which give rise to offenses? We do not by any means allow such things to be done, and we lay down this part of the law also in the strictest form for our own time and hand it on to future ages, since it is proper for men's souls to be educated first, and then their tongues. 10. In this most prosperous *civitas*, the eminent man who is prefect of this generous city must take care both to observe and to enforce all these ordinances, according as the nature of the offense requires in the case of both students and writers; but in the *civitas* of Berytus this task falls to the *vir clarissimus* who is governor of the Phoenician coast and to the most blessed bishop of the *civitas* and the professors of law. 11. Begin now, therefore, to hand on legal learning to students, under the direction of God, and open up the way we have devised, that they may become the best servants of justice and of the state, and that the greatest honor may attend you for all ages to come. In your day an exchange of laws has been devised, even such as in Homer, that father of all virtue, Glaucus and Diomedes made between themselves when they exchanged dissimilar things:

Gold for bronze, the worth of a hundred oxen for nine.

All this, we ordain, is to be in force for all future ages, to be observed by everyone: professors and students of the law, secretaries, and the judges themselves. Given at Constantinople, on the seventeenth day before the Kalends of January, when our lord Justinian, ever Augustus, was consul for the third time.[3]

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3. The date is 16 December 533.

THE CONFIRMATION OF THE *DIGEST* *

IN THE NAME OF OUR LORD GOD JESUS CHRIST
THE EMPEROR CAESAR FLAVIUS JUSTINIANUS, ALAMANNICUS GOTTHICUS FRANCICUS GERMANICUS ANTICUS ALANICUS VANDALICUS AFRICANUS, PIOUS, FORTUNATE, RENOWNED, VICTOR AND TRIUMPHER, EVER AUGUSTUS, TO THE SENATE AND ALL PEOPLES.

So great is the providence of the Divine Humanity toward us that it ever deigns to sustain us with acts of eternal generosity. For after the Parthian wars were stilled in everlasting peace, after the Vandal nation was done away with and Carthage—nay rather, the whole of Libya—was once more received into the Roman empire, the Divine Humanity contrived that the ancient laws, already encumbered with old age, should through our vigilant care achieve a new elegance and a moderate compass, a result which no one before our reign ever hoped for or deemed to be at all possible by human ingenuity. Indeed, when Roman jurisprudence had lasted for nearly fourteen hundred years from the foundation of the city to the period of our own rule, wavering this way and that in strife within itself and spreading the same inconsistency into the imperial *constitutiones*, it was a marvelous feat to reduce it to a single harmonious whole, so that nothing should be found in it which was contradictory or identical or repetitious, and that two different laws on a particular matter should nowhere appear. Now for the Heavenly Providence this was certainly appropriate, but for human weakness in no way possible. We, therefore, in our accustomed manner, have resorted to the aid of the Immortal One and, invoking the Supreme Deity, have desired that God should become the author and patron of the whole work. We have entrusted the entire task to Tribonian, a most eminent man, (master of the offices) *magister officiorum*, ex-quaestor of our sacred palace and ex-consul, and on him we have imposed the whole execution of the aforesaid enterprise, so that he himself, with other illustrious and most learned men, might fulfill our desire. Moreover, our majesty, ever investigating and scrutinizing what these men were drafting, amended, in reliance on the Heavenly Divinity, anything that was found to be dubious or uncertain, and reduced it to a proper form. Everything was completed, therefore, our Lord and God

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*This is a translation of the Latin version of the Confirmation.

Jesus Christ vouchsafing the capacity to us and to our subordinates in the task. 1. Now we have previously inserted the *constitutiones* of the emperors, arranged in twelve books, into a *Codex*, which is made illustrious by our name. After this, putting in hand a very great work, we entrusted to the same exalted man the task of collecting together and transmitting, with a certain reduction in volume, the most learned works of ancient times, already to some extent confused and fragmented as they were. While we were conducting our thorough investigations, it was intimated to us by the exalted man aforesaid that nearly two thousand books and more than three million lines had been produced by the ancient authors, all of which it would be necessary to read and scrutinize and out of them to select whatever might be best. This, by the inspiration of Heaven and the favor of the Supreme Trinity, was accomplished in accordance with our commands, given at the outset to the aforesaid exalted man: Everything that was most serviceable was collected into fifty books, and all ambiguities were resolved, without any discordant passage remaining. We have given to these books the name of *Digest* or *Encyclopaedia*, for the reason that they have within them all disputed questions and the legal solution thereof; and taking in everything that was brought together from all directions, they complete their task in about one hundred and fifty thousand lines. We have divided these books into seven groups, not inconsequentially or irrationally, but having regard to the nature and practice of enumeration and an allocation of parts in accordance therewith. 2. Accordingly, the first part of the whole product, which is called by the Greek word *prōta*,[1] is arranged in four books,[2] 3. The second section has seven books, which are called Legal Proceedings.[3] 4. In the third portion we have put everything that comes under the title Things, with eight books assigned to it.[4] 5. The fourth category, which amounts as it were to the centerpiece of the whole composition, contains eight books.[5] This includes everything relating to *hypotheca*; the subject, therefore, does not differ much from the *actio pigneraticia* (action on *pignus*), dealt with in the books on Things. Another book inserted in the same category contains the Edict of the Aediles and the *actio redhibitoria*, also the *duplae stipulatio* (stipulation for double value), which is appropriate in the case of *evictiones*; this is because all these matters are akin to the subject of purchases and sales, and the said actions were closely attendant on that subject from the first. It is true that in the arrangement of the old Edict they strayed into out-of-the way places far apart from one another, but by our care they are conjoined, as it is fitting that discussions of almost identical subjects should be kept close together. Then we have devised another book, following upon the first two, on Usury, on Maritime Loans, on Documents, on Witnesses, and on Proof, and Presumptions; these three individual books have been placed close to the portion on Things. After these we have given a place to the laws prescribed anywhere concerning betrothals, marriages, or dowries, allocating to them three books. On Tutelages and on Cares we have composed two books. The said category of eight books we have set down in the midst of the whole

1. Literally, "first."
2. Books 1–4.
3. Books 5–11.
4. Books 12–19.
5. Books 20–27.

work, and it contains all the most useful and best expressed laws drawn from everywhere. 6. The fifth section of the *Digest* is our next subject, where the reader will find whatever was said in early times about wills and codicils, both of ordinary persons and of soldiers; this is called Wills.[6] The subject of legacies and *fideicommissa* is dealt with in five books. 6a. And as no subjects are more closely connected than an account of the *lex Falcidia* with legacies, or of the *senatus consultum Trebellianum* with *fideicommissa*, we have allotted one book to each of these subjects, thus completing the whole fifth section in nine books. We have thought it right to treat the *senatus consultum Trebellianum* by itself, rejecting as we do the deceptive circumlocutions of the *senatus consultum Pegasianum*, detested even by the ancients, and the petty and superfluous distinctions between the two *senatus consulta*, and we have decided to include all the law laid down on this subject under the *senatus consultum Trebellianum*. 6b. But in this part we have said nothing about *caduca* (escheats), a department of the law which, when things were going badly and in time that cast a gloom upon the Romans, gained in strength from disasters and grew during civil wars; our purpose was that it should not survive in our own reign, which the favor of Heaven has strengthened with vigorous peace and in regard to the perils of war has placed above all peoples, and that it should not, as a grievous reminder, cast a shadow over a happy age. 7. Next comes the sixth part of the *Digest*,[7] in which are placed all kinds of *bonorum possessio*, whether relating to the freeborn or to freedmen; here is the whole law concerned with degrees of relationship and with relationship through marriage, also statutory inheritance and the whole question of succession on intestacy and the *senatus consultum Tertullianum* or *Orfitianum*, which regulate the succession of a mother to her children and of children to their mother respectively. We have confined the many forms of *bonorum possessio* to two books, reducing the subject to a brief and very clear exposition. 7a. After this we have set out in a single book the opinions of the ancient authors concerning *operis novi nuntiatio*, *damnum infectum*, the destruction of buildings and attempts thereat, and the diversion of rainwater; we have also set out here whatever we have found provided by statutes concerning tax farmers, and gifts to be effected both *inter vivos* and *mortis causa*. 7b. Another book has as its subject manumissions, and actions *de liberali causa*. 7c. In a single book there have been placed many different texts regarding the acquisition both of ownership and of possession, and regarding special forms of such acquisition. 7d. A further book has been assigned to the subject of those persons who have suffered judgment against them, or have confessed during legal proceedings, also detention of goods, and sales thereof for insolvency, and to the prevention of frauds on creditors. 7e. After this,

6. Books 28–36.
7. Books 37–44.

all interdicts are dealt with together; next come defenses, and lapse of time, obligations, and actions; a single book deals with these, so that the above-mentioned sixth part of the whole volume of the *Digest* is contained in eight books. 8. The seventh and last section of the *Digest* is made up of six books.[8] Here is all the existing law that deals with stipulations or verbal obligations, and guarantors and mandators, also novations, performances, formal releases, and praetorian stipulations; what is contained here in two books appeared in countless ancient ones. 8a. After this there have been placed two terrifying books dealing with private and extraordinary offenses and with public offenses, which describe the total severity and harshness of the penalties. Mingled with these are the provisions that have been made concerning audacious men who endeavor to conceal themselves and display themselves as contumacious, and also the question of the penalties that are inflicted on condemned persons, or remitted, and the subject of their property. 8b. We have devised a single book on appeals against judgments deciding both civil and criminal cases. 8c. Whatever else has been found in the ancient works or has been laid down by statutes for members of the municipalities or decurions, for *munera* or public works or fairs (markets), and for unilateral promises and different forms of trial and for *census*, or the meaning of words; all these are contained in the fiftieth book, the final one of the whole compilation. 9. All this has been completed through the eminent and most learned man Tribonian, *magister*, ex-quaestor and ex-consul, who is adorned alike with the arts of eloquence and of legal knowledge and who is also distinguished in practical affairs and has no greater or dearer object than obedience to our commands. In the completion of the work others have participated: Constantinus, *vir illustris*, *comes sacrarum largitionum*, and *magister libellorum sacrarumque cognitionum*, who has always enjoyed our confidence because of his good reputation and his distinction; Theophilus, *vir illustris*, *magister* and learned in the law, who exercises in a praiseworthy manner the supreme control of legal teaching in this most splendid *civitas*; Dorotheus, *vir illustris*, a most eloquent man of quaestorian rank whom, when he was engaged in transmitting [knowledge of] the laws to pupils in the most splendid *civitas* of Berytus, we summoned to us, on account of his very great reputation and renown, and caused to participate in this work; Anatolius, *vir illustris* and *magister*, who was deputed to this work while a professor of law at Berytus, a man of ancient legal stock, since both his father Leontius and his grandfather Eudoxius left behind them an excellent rep-

8. Books 45–50.

utation in legal learning; and also Cratinus, *vir illustris* and *comes sacrarum largitionum*, once the highest professor of this generous city. All these men were chosen for the work aforesaid, with Stephanus, Menas, Prosdocius, Eutolmius, Timotheus, Leonides, Leontius, Plato, Jacobus, Constantinus, and Johannes, most learned men, who act as counsel in cases heard before the supreme court of the prefect of the East and enjoy a testimony to their ability from all quarters, and who were chosen by us for the completion of this great work. When they had all met together under the direction of Tribonian, that eminent man, in order to finish this great work under our authority, the task was completed, by the favor of God, in the prescribed fifty books. 10. Now we had such great reverence for antiquity that by no means did we suffer these men to consign to oblivion the names of those learned in the law; but every one of those who wrote on the law has been named in our *Digest*. All we have done is to provide that if in their legal rulings there seemed to be anything superfluous or imperfect or unsuitable, it should be amplified or curtailed to the requisite extent and be reduced to the most correct form. In many cases of repetition or contradiction, that which appeared to be better has been set down in place of all alternatives and a single authority has been given to the whole, so that whatever has been written there should appear as our own work and composed by our own will. No one may dare to compare any ancient text with that which our authority has introduced, since many very important changes have been made for reasons of practical utility; this has gone so far that where an imperial *constitutio* has been set out in the old books, we have not spared even this but have decided to correct it and revise it in a better form, leaving the names of the ancient authors but preserving by our emendations whatever was proper and necessary to preserve the real intention of the laws in question. Because of this, even if anything was doubtful in the old books, the question has now been settled in the most secure way, and no room for hesitation is left. 11. We saw, however, that so great a burden of knowledge is too much to be borne by those men who have little education and, although eager to master the secrets of the law, are as yet standing only in its first entrance-court. We therefore formed the opinion that another compilation of moderate extent ought to be prepared, so that they, receiving a new coloration from it and, so to speak, imbued with the first fruits of the whole subject, might be able to proceed to the innermost parts of it and absorb with eyes undazzled the exquisite beauty of the law. We therefore summoned the eminent man Tribonian, who was chosen to direct the whole work, with Theophilus and Dorotheus, *viri illustres* and most eloquent professors, and commissioned them to collect one by one the books that were composed by ancient authors containing the first principles of the law and known as *Institutes*.

Whatever they found in these that is useful and most appropriate and perfect from every point of view and in accordance with the practice of the present day, this they were to be careful to take and to put into four books and make it into the very foundation and first principles of education, and thus enable young men, with its support, to grasp the weightier and more finished provisions of the law. We also instructed them to be mindful at the same time of our own *constitutiones*,[9] which we have issued for the improvement of the law, and, in composing the *Institutes*, not to omit inserting the same improvements, so that it may be clear both where uncertainty had existed previously and what has since become secure. When the work had been finished by these men it was produced to us and scrutinized; and we received it favorably and judged it to be not unworthy of our intentions. And we gave orders that the aforesaid books should have the force of *constitutiones*; this is set out in more detail in our own discourse which we have inserted as a preface to the same books. 12. The whole framework of Roman law, then, was put together and compiled in three volumes: one of *Institutes*, one of the *Digest* or *Encyclopaedia*, and one of *constitutiones*;[10] and this was concluded in three years, although when the work first began to be undertaken it was not expected to be finished within ten years. We offered this labor also to Almighty God with pious intent for the preservation of mankind, and we gave abundant thanks to the Supreme Deity, who has vouchsafed to us both the successful conduct of war and the full enjoyment of honorable peace, and moreover the giving of the best laws, not merely for our own age but for all time, both present and future. (13). We saw it was necessary, therefore, that we should make manifest the same system of law to all men, so that they might perceive how greatly they have been relieved from a state of confusion and uncertainty, and what a condition of reasonableness and lawful integrity has been achieved. In the future may they have laws that are straightforward as well as brief, and easily available to all, and also such that it is easy to possess the books containing them, so that men may not need to obtain with a great expenditure of wealth volumes containing a large quantity of redundant laws, but the means of procuring them for a trifling sum may be given to both rich and poor and great learning be available at a very small cost. 13 (14). If by chance, in so great a collection of laws taken from an immense number of books, a few cases of repetition should be discovered, let no one think it an occasion for disparagement; it should rather be ascribed in the first place to human weakness, which is part of our nature, since it pertains to the divinity rather than mortality to have a memory for all things and to give offense in no respect at all, as indeed was said by our ancestors. It must also be realized that repetition in certain matters that are very briefly expressed is not without its usefulness and has been practiced without going contrary to our instructions, since either the law in question was so relevant that it had to be referred to under different headings, because the subjects were related, or else, as it was involved in other different topics, it was impossible to exclude it from some passages without throwing the whole into confusion. And in these passages, in which there appeared

9. Justinian's *Codex*.
10. Justinian's *Codex*.

excellent ideas of the men of old, it would have been thoroughly offensive to split up and separate out something that had been distributed among them piecemeal, as it would have given offense to the minds of readers as well as their ears. 14. Similarly, if anything has been laid down by imperial *constitutiones*, we have by no means allowed it to appear in the *Digest*, the reading of the *constitutiones*[11] being sufficient; but this too has been done occasionally, for the same reasons for which repetition has been allowed. 15. As for any contradiction occurring in this book, none such has found a place for itself, and none will be discovered by anyone who reflects acutely upon the modes of diversity. On the contrary, something will be found, even if obscurely expressed, which removes the objection of inconsistency, gives the matter a different aspect, and passes outside the limits of discrepancy. 16. Again, if any passage has been omitted which was, so to speak, lying hid in the depths among so many thousand things, and although proper to be included, was left in obscurity and unavoidably overlooked, who could justifiably find fault with this? In the first place, indeed, it can be put down to the limited extent of human intelligence; and second, there is the intrinsic difficulty of the matter, where the passage was so closely bound up with many unprofitable ones and gave the reader no opportunity of detaching it. 17. One remarkable fact has come to light from these books: that the mass of old work gives the appearance of being smaller in compass than the present work for all its brevity. The fact is that the men who conducted legal actions in days gone by, in spite of the large number of laws that had been laid down, nevertheless made use of only a few of them in litigation, either because of a lack of books, which it was impossible for them to procure, or because of their own ignorance; and lawsuits were decided according to the will of the judges rather than legal authority. But in the present compilation, that is to say our *Digest*, the law has been extracted from numerous volumes, the very names of which the men of old not merely did not know, but rather (we might say) had never heard. The whole of it has been composed on the basis of a most ample supply of material in such a way that the ancient plenitude appears paltry, while our own brevity proves very rich. Of the ancient learning, that most excellent man Tribonian has supplied us with a very large quantity of books, many of which were unknown even to the most learned men themselves. All these were read through, and whatever was most valuable was extracted and found its way into our own excellent composition. But the authors of this work did not read through those books only from which they took the laws they have included; they read many others in which they found nothing useful or new to extract and insert in our *Digest*, and which with good judgment they rejected. 18. Now things divine are entirely perfect, but the character of human law is always to hasten onward, and there is nothing in it which can abide forever, since nature is eager to produce new forms. We therefore do not cease to expect that matters will henceforth arise that are not secured in legal bonds. Consequently, if any such case arises, let a remedy be sought from the Augustus, since in truth God has set the imperial function over human affairs, so that it should be able, whenever a new contingency arises, to correct and settle it and to subject it to suitable procedures and regulations. We are not the first to say this. It is of ancient descent, since Julian him-

11. Justinian's *Codex*.

self, that most acute author of legal writings and of the Perpetual Edict, set it down in his works that if anything defective be found, the want should be supplied by imperial legislation. Indeed, not he alone, but also the defied Hadrian, in the composition of the Edict and the *senatus consultum* that followed it, laid down in the clearest terms that if anything were found to be not stated in the Edict, later authority could settle this in accordance with its rules and opinions and by closely following these. 19. Now, therefore, since you know all this, conscript fathers and all men in the whole world, give the fullest thanks to the Supreme Divinity, who has reserved so greatly beneficial a work for your times. For your times indeed there has been vouchsafed that which the men of old times were not held by the divine judgment to be worthy. Reverence these laws therefore and observe them, and allow the more ancient ones to lie at rest; and let none of you dare either to compare these laws with the former ones or, if there is any discrepancy between them, make any inquiry, since whatsoever is set down here, we resolve that this and this alone be observed. In a legal proceeding and any other contested matter where laws are applicable, let no one seek to quote or produce anything except from the aforesaid *Institutes* and our *Digest* and the *constitutiones* composed or promulgated by us,[12] unless he wishes to be subjected to a charge of falsehood as a forger, together with the judge who permits such things to be heard, and to endure the most severe penalties. 20. However, lest it be unknown to you what those books of the ancients are from which this compilation has been made, we have ordered that this too should be set out at the beginning of our *Digest*, to make it very clear from which legal authorities and which of their books and how many thousands of them this temple of Roman justice has been constructed. 20a. Among legal authorities or commentators we have chosen those who were worthy of so great a work as this and whom earlier most dutiful emperors did not think it unworthy to admit; to all of them one lofty summit of dignity has been allotted in common, and none claims any pre-eminence for himself. Indeed, since we have ordained that these laws should have the force of *constitutiones* and be as if promulgated by ourselves, why should any greater or less importance be attributed to any of them, when one rank, one authority, is given to all? 21. Now there is one thing which we decided from the outset, when with divine approval we commissioned the execution of this work, and it seems opportune to us to ordain it now also: that no one, of those who are skilled in the law at the present day or shall be hereafter, may dare to append any commentary to these laws, save only insofar as he may wish to translate them into the Greek language

12. Justinian's *Codex*.

in the same order and sequence as those in which the Roman words are written (*kata poda*, as the Greeks call it);[13] and if perhaps he prefers to make notes on difficulties in certain passages, he may also compose what are called *paratitla.*[14] But we do not permit them to put forward other interpretations—or rather, perversions—of the laws, for fear lest their verbosity may cause such confusion in our legislation as to bring some discredit upon it. This happened also in the case of the commentators on the Perpetual Edict, who, although the compass of that work was moderate, extended it this way and that to diverse conclusions and drew it out to an inordinate length, in such a way as to bring almost the whole Roman legal system into confusion. If we have not put up with them, how far can vain disputes be allowed in the future? If any should presume to do such a thing, they themselves are to be made subject to a charge of fraud, and moreover their books are to be destroyed. But if, as was said before, anything should appear doubtful, this is to be referred by judges to the very summit of the empire and made clear by the imperial authority, to which alone it is granted both to create laws and to interpret them. 22. We also prescribe the same penalty on the ground of fraud for those who in the future may dare to write down our laws by means of obscure signs in code. We wish that everything—that is to say, the names of the legal experts and the titles and numbers of the books—be made manifest through a succession of letters and not in a code, so that anyone who procures for himself one of these books in which coded signs are used in any passage whatsoever of the book or the volume must realize that he is the owner of a useless work; for we do not give to anyone who has objectionable coded signs in any part of such a work the right to cite anything from it in legal proceedings. Moreover, even the secretary who has dared to write such signs is not only to be punished criminally, according to what has been said, but is also to give the owner of the book double its value, if that owner himself either bought the book or ordered it to be copied in ignorance of its contents. This ruling has already been issued by us both in a Latin *constitutio* and in a Greek one, which we have sent to professors of law. 23. These our laws, which we have set out in these works, that is to say, the *Institutes* or *Elements* and the *Digest* or *Encyclopaedia*, we proclaim are to be in force from our third most fortunate consulship, on the third day before the Kalends of January in the present twelfth indiction;[15] they are to be valid for all time and have effect together with our *constitutiones*,[16] demonstrating their efficacy in legal proceedings in all cases, whether arising in the future or still pending in court without having been disposed of by a judgment or a friendly settlement. Those cases which have been either ended by a judicial decision or settled by a friendly arrangement we do not by any means wish to be brought to life again. In hastening to

13. The Greek implies following closely in another's footsteps.
14. Explanatory notes.
15. The date is 30 December 533.
16. Justinian's *Codex*.

issue these laws in our third consulship we have done well, since the hand of Almighty God and of our Lord Jesus Christ has made that consulship the most fortunate of all for our state; during its course the Parthian wars were concluded and consigned to lasting rest; the third part of the world was annexed to us (for after Europe and Asia, the whole of Libya too was added to our empire); and now that the crowning portion has been placed on the great work on our laws, all the gifts of Heaven have been showered upon our third consulship. 24. Now, therefore, let all our judges in their respective jurisdictions take up these laws and observe and apply them, both in their own spheres and in this royal city, and most particularly that exalted man, the prefect of this generous city. It will be the duty of the three exalted praetorian prefects, of the East, of Illyricum, and of Libya, to make these laws known by the exercise of their authority to all those subject to their jursidictions. Given on the seventeenth day before the Kalends of January when our lord Justinian was consul for the third time.[17]

17. The date is 16 December 533.

THE CONFIRMATION OF THE *DIGEST*[1]

IN THE NAME OF OUR LORD AND GOD JESUS CHRIST
FLAVIUS JUSTINIAN, EMPEROR AND CAESAR, CONQUEROR OF THE ALAMANNI, THE GOTHS, THE FRANKS, THE GERMANS, THE ANTES, THE ALANS, THE VANDALS, THE AFRICANS, PIOUS, FORTUNATE, RENOWNED, VICTORIOUS, TRIUMPHANT, EVER-VENERABLE AUGUSTUS, TO THE SENATE, THE PEOPLE, AND ALL THE CITIES OF OUR EMPIRE.

God has granted us, after Our peace with the Persians, Our triumph over the Vandals, Our taking of the whole of Libya, Our regaining of most famous Carthage, to fulfill the task of restoring the ancient laws—something which none of the Emperors that have reigned before Us ever hoped even to conceive, nor would they have thought it[2] humanly possible at all. For the bringing of Roman jurisprudence, which was self-contradictory from the foundation of the elder Rome until the time of Our own reign (a span of about fourteen hundred years) not only in other things but also in the Imperial enactments themselves, to full harmony and clarity;[3] the removal from it of discord and the exclusion of repetitions and similarities; and the provision for it of a single beautiful form, so that for each subject there should be one law in being—these were a matter for prompting from Above, and for the love of mankind that proceeds Thence, but not the result of any human thinking or undertaking or power at all. We therefore (as is indeed Our custom), lifting up Our hands to God and beseeching Him to assist Us, undertook and accomplished it all, employing, for the execution of the whole work, the most renowned Tribonian, Master of the Offices, ex-quaestor of Our sacred palace and ex-consul, together with other renowned and learned men; and We, constantly inquiring about the work in progress and acquainting Ourselves with what was doubtful, by

1. The Greek Preface, normally referred to as *Dedoken*, "He has granted," from the first word of the Greek text. Translated by Sebastian Robinson and Olivia Robinson.
2. Reading *auto* instead of the meaningless *auno*.
3. Reading *diaphaneian*.

virtue of the knowledge and fervor implanted in Us by Jesus Christ, Our Lord God and Savior, brought it all to a fitting conclusion. 1. Therefore, having previously brought together the imperial enactments in twelve books, We composed the book named after Our Majesty; and now, having assembled the opinions of all those who have built up the imperial law up to this time, drawn from the multitude of their books—which number some two thousand, having a total number of not less than three million lines—We have assembled them into a well-proportioned collection, readily taken in at a glance. We have therefore formed the whole into what are now fifty books, assembling from the earlier material that which was useful, resolving all queries[4] and leaving nothing still confused. This book We have called the *Digest* or *Pandects*,[5] applying this title to it because it contains the divisions and forms of the laws and because it sets out the whole collected into one. We have allotted it a total of not more than one hundred and fifty thousand lines, divided into seven treatises, not arbitrarily but with a view to the nature and agreement of the contents. 2. That which everyone calls Preliminaries, We have divided into four books.[6] 3. Next in order is Legal Proceedings in a further seven books.[7] 4. And then On Things in no more than eight.[8] 5. Next in order is that part of the work which is the fourth and center of the whole. We have covered it in another eight books.[9] In this the section on hypothec is not far from that dealing with pledges;[10] there is also the Aedilician Edict and the stipulation concerning eviction, both of which go along with sales.[11] We have brought them close together—although they were located far apart in the body of the law—because of their relationship to one another, so that discussions of similar topics should not be far separated. Then We added to these the sections on interest, both by land and for sea voyages, on deeds, the production of witnesses, proofs and presumptions, in one book,[12] placing these three individual books next to one another after the treatise On Things. Again, assembling what has been laid down on betrothed persons, marriages and dowry, We have allotted three books to this grouping also.[13] And then there are two books concerning those who have care of the young, those which everyone calls On Tutories.[14] We have thus summarized the treatise contained in these eight books, and We have made them the most central part, so to

4. "cutting out what is questionable"?
5. *Encyclopaedia.*
6. Books 1–4.
7. Books 5–11.
8. Books 12–19.
9. Books 20–27.
10. Book 20.
11. Book 21.
12. Book 22.
13. Books 23–25.
14. Books 26–27.

speak, of the whole collected work, recording in them the most elegant and the most useful laws. 6. All the material concerning wills, legacies and *fideicommissa*, We have assembled in a total of nine books.[15] We begin with the two concerning wills and codicils, both in general (as We describe them) and those which soldiers make when they so wish; these books are titled On Wills.[16] Next in order are the five which discuss legacies and *fideicommissa* and all questions relating to them.[17] 6a. And since the subject of the *lex Falcidia* bordered upon and fitted together with the particular nature of wills and *fideicommissa*, We therefore placed it directly next to the treatise on legacies, allotting a complete book to it together with a short appendix.[18] Again, since, on the model of the *lex Falcidia*, there existed the *senatus consultum* called *Trebellianum* relating to *fideicommissa*, We have given this the final place in the same section, assembling the whole of this law under the *SC Trebellianum*.[19] We found the law contained in the old *SC Pegasianum* to be superfluous, and the differences and overlappings of these *SCC* to be contrary to reason—something which even the old writers hated, calling them "cunningly contrived" and "prejudicial"; We embraced the whole concept in a simpler logic, adapting its arrangement to that of the *SC Trebellianum*. This then, the fifth part of the whole composition, is completed[20] in these nine books. 6b. In these books nothing is said by Us about those estates which used to fall to the fisc, because these were prevalent as an unfortunate necessity in the Romans' political situation, standing as a terrible memorial of the civil wars; there was no need for Us to make political provision for them in times wherein God has granted Us to have peace both at home and abroad and when, should it be necessary to make war, it is easy for Us, with His influence, to master Our enemies. 7. There follows the sixth part of Our whole composition, comprised in eight books.[21] It begins elegantly with what is called Estate Possession. We have examined this closely—as We have done with other subjects—as pertaining both to freeborn persons and to freedmen, and have brought it from its former great confusion and obscurity to clarity and brevity, having decided that two books are a sufficient number.[22] We have woven in with this all the successions called intestate, including in the book also the provisions concerning relationships and degrees of kindred; in the margins[23] of the subject we have brought together what has been written on the *SCC Tertullianum* and *Orfitianum* whereby mothers and children become heirs to one another. 7a. Next in order comes another book which sets out the law on building works and the security to be offered against the collapse of buildings or their demolition; on persons who offend in any way in these matters, and those who cause injury to their neighbors by the diversion of [rain]water; on those who collect the State taxes; and on gifts, both those not otherwise defined and those given in expectation of death.[24] 7b. Again, anything concerning any kind of manumission, or concerning actions on the same subject, is assigned to a single book.[25] 7c. Then We have made into a single treatise matters concerning possession[26] and ownership taken by virtue of it, and the titles giving rise to it.[27] 7d. And anything at all concerning judicial decisions and persons who in these proceedings make any admissions against themselves; and concerning bankruptcy and the possession and sale of an estate by creditors; and the separation of property and the care to be taken, and that creditors should not suffer harm; all this likewise is collected in one book.[28] 7e. And the space We have allocated to

15. Books 28–36.
16. Books 28–29.
17. Books 30–34.
18. Book 35.
19. Book 36.
20. Reading *anuetai*.
21. Books 37–44.
22. Books 37–38.
23. Reading *eskhatia*.
24. Book 39.
25. Book 40.
26. Deleting *nome*.
27. Book 41.
28. Book 42.

interdicts does not exceed one book.[29] From there, We have proceeded to defenses and the times set for them, and have set out the form of obligations and actions.[30] And We have brought together the whole of this part, starting with the texts on what is called estate possession, in a total of eight books, making this the sixth section of the whole composition. 8. The last [part] of all, being the seventh section of the whole treatise, is comprised in a total of six books.[31] We begin with stipulations and go through the texts on personal securities and the payment of debts, their discharge and release, and stipulations introduced by the praetor's jurisdiction (all of which have been covered by Us in two books[32] although previously it is impossible even to say how many there were). 8a. Shortly [We come] to the account of accusations and to everything set out[33] on the lesser offenses, which are called "private," and those which are described as "not of the *ordo*," but have had the name "extraordinary" applied to them.[34] Then it progresses to the "public" crimes, which are the most serious and call for severe penalty.[35] And here two books contain everything[36] on delicts and crimes; along with these are incorporated provisions on those who, having been charged with an offence, have failed to put in an appearance; on their property; and on the penalty or remission applicable to those found guilty. 8b. The beginning of Our next book,[37] again, is an account of appeals, covering, as is reasonable, both civil and criminal judgments.[38] 8c. Whatever was laid down by previous legislators concerning citizens, decurions and their obligations, public works, market-days, promises of [civic] performance, miscellaneous judicial proceedings and the public census, and whatever material there is concerning the use of terms and what has been said by the jurists of old on the maxims of law, is all included in the final book[39] of the section which began with stipulations—the sixth book counting from the start of the section, but the fiftieth as regards the arrangement of the entire work. 9. All of this has been composed and executed, elegantly and worthily in accordance with Our orders, by Tribonian the renowned and most learned Master of the Offices, ex-quaestor of Our palace and ex-consul, a man distinguished in action, in speaking and in the drafting of laws, who placed Our commands before everything else, and by his subordinates who executed the task for Us: Constantine, most magnificent Count of the State Treasury and Controller of the State Register of Petitions and Imperial Enactments, who in everything showed Us his valuable reputation; and also the most magnificent master Theophilus, who teaches law in this Imperial city nobly, tirelessly and in a manner worthy of his teaching profession; and Dorotheus, most magnificent quaestor, appointed teacher of law in the city (We are speaking of the celebrated and notable metropolis of Beirut), whose valuable reputation brought him to Us and caused him to take part in these present labors; and the most magnificent master Anatolius, himself an excellent teacher of jurisprudence at Beirut and a third-generation descendant of a revered Phoenician family of teachers of law (he traces his ancestry back[40] to Leontius and Eudoxius, teachers of jurisprudence after Patricius of happy memory, quaestor and

29. Book 43.
30. Book 44. The text's *agogon* should presumably be *agonon*.
31. Books 45–50.
32. Books 45–46.
33. Reading *katalegomena* for the text's *katalegon*.
34. Book 47.
35. Book 48.
36. Reading *panta*.
37. Book 49.
38. Lit. "judgments related to property and those arising from accusations."
39. Book 50.
40. Reading *anapherei goneis*.

their predecessor,[41] and Leontius the universally-lauded ex-Prefect, ex-consul and patrician, his son, all of them rightly admired); and Cratinus, most magnificent and learned Count of the State Treasury (and who is himself a fine expounder of law in this Imperial city); and in addition to them, Stephen, Menas, Prosdocius, Eutolmius, Timothy, Leonidas, Leontius, Plato, Jacob, Constantine and John, men of the highest learning, all of whom are advocates practicing in the court of Our most renowned Praetorian Prefects and justly enjoying a reputation for learning among all men; they were rightly judged by Us as being worthy to take part in so great a task. These facts about the drafting of the Digest have been prepared for Us by those just named by Us as renowned and learned men. 10. Such has been Our respect for antiquity that We have not dared to expunge[42] the names of the jurists of old, but have inscribed the name of each of them on their laws, though making changes if anything seemed to Us to be incorrect, deleting some portions and adding others, choosing the most elegant where there are many [versions], and giving equal force of authority to all. As a result whatever is written in the book may be seen to be Ours[43] and to have been done by Our will; no one is to venture to compare what has now been done with the previous texts, since We have changed many—too many to be readily counted—for the better, even if something in an Imperial enactment made by an earlier Emperor states otherwise. For, while preserving the names of the jurists of old, We have imposed Our own truth on the laws, so that if anything in them was the subject of dispute (and there was a great store of such matters), it has now been decided and determined and reduced to clear and purposeful law. 11. But since it was necessary that a modest introduction should be made for those who have just become engaged in the law and have not yet gone through the greater course of study, We have not omitted this from Our forethought, but, issuing orders to the most renowned Tribonian, who has been entrusted with the whole task of legislation, and to Theophilus and Dorotheus, most magnificent and learned professors, We arranged that they should, from the material in the old introductions, select, collect and bring to Us that which is most up to date, authoritative and relevant to current public affairs, and should also bear in mind the enactments which We Ourselves issued in order to correct those issued previously, and thus draw up four books, forming the initial elements of the introductory course, which it has pleased Us to call the *Institutes*. And they, having drafted this law-book, brought it to Us, and We, having

41. The text has *antikinsora*, a transliteration of the Latin *antecessor*.
42. Reading *apaleiphai*.
43. Inserting *hemeteron einai dokein kai*, as suggested by Mommsen.

examined and analyzed the whole of it, have judged it to be sound and in accordance with Our intention, and We have declared it to be Our book, and have made clear to all that it has the force of Our enactments in accordance with what We have discussed in the preface to this book. 12. Therefore, having thus organized the Roman law, We accomplished this mighty task in three complete books and the same number of years, (something which was, at the beginning, beyond all expectation). Even after We had shown that the task was feasible, it was expected that the whole would not be assembled until ten years had elapsed. However, having swiftly completed it in a mere three years in all, and having given the credit to the Lord God, Who granted Us to make peace, to bring Our wars to a successful conclusion, and to legislate for all time—both Our own time and that which is to come after us[44]—We thought it right to make manifest to all men Our zeal and forethought on their behalf: that, being freed from the disorder and confusion of previous legislation which lacked any definite end, they may now use straightforward, concise laws, convenient for all who welcome the shortening of lawsuits,[45] and available to all who wish to acquire them easily, not requiring great expenditure, as where a mass of those [old] useless books might have had to be collected, but offering for a small price, both to the rich and to those who enjoy slenderer means, freedom to acquire them. 13. But, since so much has now been collected here, and material brought together from so many tens of thousands of sources, if anything should appear to be repetitious—something however which We think will be rare—yet this will be seen by those who have regard to human nature as not beyond the bounds of legitimate defense; for, in all things, freedom from error is attainable by God's power alone, not by that of man, as Our predecessors also have said. Further, there are places where We admitted the inclusion of similar material, either beause the subjects treated required the application of the same principle in a number of places, or because that which appears to be similar to the previous text is combined with quite other material and their separation would be difficult, or again because of the frequent need to preserve material which holds together the whole argument, not pulling the sense of it

44. Deleting, with Koehler, *to te pro hemon.*

45. This seems to be the only translation compatible with the meaning of *aspazomenois* = "welcoming," which can hardly go with *nomois.*

apart by the deletion of words already in the text. Furthermore, where this has been done because the matter required it, it is brief and barely perceptible. 14. We have followed the same rule as regards the existing provisions in the Imperial enactments. For We have not permitted what is said in[46] these to be included in this book, except to the extent that We have defined above by way of defense to charges of repetition. 15. No-one will easily find any law which runs counter to the others in this book, even if he should strive to go beyond every limit of contrariety; but one must assume an element of distinction which makes the law apply differently to different cases. 16. But even if it should happen that there are any things which ought to be added (for such an occurrence is likely, as the result of the weakness of human nature), nonetheless it would be on the whole better for Our subjects to be freed from much that is bad than for Us to let remain what are, perhaps, a few apparently useful provisions buried among countless tens of thousands [of others], stored away and known to hardly anyone at all, thus easily escaping notice. 17. Yet although there are so many books which were written previously, the judgments given in actions before the courts relied on a very small number of jurists and books, in some cases because they did not have the books available, in others because they were not up to the heavy labors [involved], lacking the power to find most of the useful texts; now however in this edition there has been assembled a great number of effective laws, drawn from books that are rare and hard to find, books whose very names were unknown to the majority even of those famed for their skill in the law. Of these, the most plentiful supply was provided by the said most renowned Tribonian, who has provided a mass of books, so many as to be difficult to count, all of which he has fully read in compiling these present books. Although those whom We brought together for this purpose came upon many other books, they properly rejected their inclusion in this edition of the laws, finding in them nothing worthy of attention or innovatory when set against earlier collections. 18. Should anything hereafter be doubtful and appear not to be covered by these laws (for nature naturally tends towards a great measure of innovation), yet God has set the Imperial power over men for this purpose, so that, constantly making provision for those who have need, it may make good the uncertainty of human nature and surround it with explicit laws and boundaries. Nor are We the only ones to have said this; Julian,

46. Inserting *en*.

the most learned of all those famous as jurists, has manifestly said the same, and he has called on the Imperial power to provide what is sought as the need arises. Moreover, Hadrian of happy memory, when he collected the praetors' annual edicts in a short book, for which he enlisted the help of the most mighty Julian, said the same in a speech which he delivered publicly in the former Rome: that if anything were tc occur beyond what had been laid down, "it is proper that the authorities should try to define and remedy it by reference to its conformity with what has already been laid down." 19. All recognizing this therefore (we are speaking of you, mighty Senate, and every other man in Our city), are to acknowledge their gratitude to God, Who has reserved so great a boon for your own time, and to make use of Our laws. You are to give no heed to any of those included in the old books nor to compare them against those now in being; because even if it were to appear that there is any incompatibility between one and the other, the earlier one will be unprofitable and displeasing to Us, while the present one[47] should be seen to prevail. For We forbid any use to be made hereafter of the former, while We assent and decree that the others alone should govern and have force: so that anyone attempting to make use of any laws from the former books, rather than solely from the two books and the enactments brought together by us and now in being, or to cite them in the courts, or, if he be a judge, to tolerate their being produced before him, shall be liable to a charge of forgery and, on conviction for a public crime, shall be automatically liable to the penalty, this being manifest even if We have not stated it. 20. And to set out before the *Digest* the names of the jurists of old, their books, and the sources from which originated the collection of laws now brought together by Us—this We judged to be best, and We decreed that it should be done, as indeed it has been done; and at the same time We laid down that everything to do with them should be subject to Our Imperial enactment, so that the unbounded and indeterminate extent of the former [law], as against the fully explored nature of Our own, should be manifest to all. 20a. We have brought together those jurists, or commentators on the laws, who stand approved by all, those who have pleased previous Emperors and achieved recognition from them; for if anyone is not among those who were recognized by the former legislators, We have excluded him from participation in this book. And We have further given all those included here one single rank and status, not honoring any one with greater authority as compared with another; for if We have given the force of Imperial enactments to all their writings, how could any of these be regarded as having greater or lesser standing? 21. We forbid to all alike, that which We did immediately on ordering the compilation of this legislation, which We now confirm: Nobody, whether of those now living or of those hereafter, is to dare to write commentaries on these laws, save only if he wishes[48] to translate them into Greek and to follow

47. Reading *to de nun.*

48. The *me*, "not" seems unnecessary, and is not supported by *Tanta.* It may be suggested by the negative form of the sentence.

strictly[49] (what is called "*kata poda*"—following on the heels) the interpretation of the laws; and again if he should, as is reasonable, wish to make some annotation because of a need for what are called *paratitla*.[50] Anything else We forbid to everyone: they must not do the slightest thing that would give the laws any occasion for discord, doubt and bulk, as[51] previously happened with the jurisprudence on the Edict, with the result that, although this is itself so very short, it was extended, by the differences between the various commentaries, into an incalculable bulk. For if it should happen that anything appears doubtful, either to litigants before the courts, or to those who preside as judges, the Emperor shall give correct guidance, as He has the sole right to do under the laws. So if anyone dares, contrary to this Our juristic principle, to set down any commentary of a kind other than that prescribed in Our order, let him know that he is liable under the laws on forgery, his work being seized and utterly destroyed. 22. The same penalty is imposed on those who make use of any codemarks in the text (what are called *sigilla*), by means of which they seek to throw the text into confusion, by not writing out in full the numbers [of the books],[52] the names of the previous authorities, and the complete juristic argument. Those also who come into possession of a book written in this manner are to know that they will find their possession of it unprofitable; for We grant no license for books of this kind to be used officially in the courts and to have effect, even if it should happen that as regards the part from which a reading is taken the book bears no mark of this kind, but does so in any other part whatever, even if this has only occurred once. As a result, [the possessor] will have a book which is in all respects as if it had never been written, while he who wrote it and gave it to the unwitting possessor shall pay the injured party a sum of twice its assessed value; nonetheless, a criminal penalty will also be competent against him. For We have indeed written the same in the other enactments which We have issued on these matters, both those which have been published in the language of the Romans and that which We wrote in Greek in responses to teachers of law. 23. These books then—we are speaking of the books of the *Institutes* and the *Digest*—We decree to have effect as from the end of Our third happy consulship, that is, from the thirtieth day of December of the present twelfth indiction [533 AD], to have effect for all time thereafter, having equal force with the Imperial enactments and possessing the same standing as regards both

49. The Latin text has *sub eodem ordine et consequentia*—"in the same order and sequence."

50. Explanatory notes.

51. Deleting *touto*.

52. *Tanta* has *librorum numeros*.

proceedings which shall arise and those pending in the courts which have not been the subject of an amicable composition; for We do not venture to disturb anything which has previously been judged or agreed. This third consulship, which God has granted us, is the most splendid, since during it the peace with the Persians was confirmed; the book of laws, the like of which is not to be found among any of Our predecessors, was composed; and in addition a third part of the inhabited world—we are speaking of the whole of Libya—was added to Our empire. All these things have been granted to Us, as gifts for Our third consulship, by the great God and Our Savior Jesus Christ. 24. Therefore all the most splendid judges of Our Imperial city, receiving from Us this Our Imperial enactment, shall prepare to make use of Our aforesaid laws, each in his own court. The most renowned [Urban] Prefect shall set it forth in this great and Imperial city. It shall be the responsibility of Our most marvelous and well-famed Master of the Offices, and of the most renowned and universally-lauded Prefects of Our holy Praetorians, both those in the Orient and those in Illyria and Libya, to make these things manifest to all those placed under them, by means of local decrees, so that all Our subjects should know everything without deception. **Dated December 16th in the third consulship of our Lord Justinian, perpetual Augustus.**

THE ANCIENT WRITERS AND THE BOOKS PRODUCED BY THEM FROM WHICH THE PRESENT CORPUS OF THE *DIGEST* OR *ENCYCLOPAEDIA* IS DERIVED

I. Julian	1. *Digest*, 90 books
	2. *Minicius*, 6 books
	3. *Urseius*, 4 books
	4. *Doubtful Questions*, sole book
II. Papinian	1. *Questions*, 37 books
	2. *Replies*, 19 books
	3. *Definitions*, 2 books
	4. *Adulteries*, 2 books
	5. *Adulteries*, sole book
	6. *Duties of the City Prefect*, sole book
III. Quintus Mucius Scaevola	1. *Definitions*, sole book
IV. Alfenus	1. *Digest*, 40 books
V. Sabinus	1. *Civil Law*, 3 books
VI. Proculus	1. *Letters*, 8 books
VII. Labeo	2. *Posthumous Works*, 10 books
VIII. Neratius	1. *Rules*, 15 books
	2. *Parchments*, 7 books
	3. *Replies*, 3 books
IX. Javolenus	1. *From Cassius*, 15 books
	2. *Letters*, 14 books
	3. *Plautius*, 5 books
X. Celsus	1. *Digest*, 39 books
XI. Pomponius	1. *Readings on Quintus Mucius*, 39 books
	2. *Sabinus*, 35 books
	3. *Letters*, 20 books
	4. *Readings*, 15 books
	5. *Plautius*, 7 books
	6. *Fideicommissa*, 5 books
	7. *Senatus Consulta*, 5 books
	8. *Rules*, sole book
	9. *Manual*, 2 books
XII. Valens	1. *Fideicommissa*, 7 books
XIII. Maecian	1. *Fideicommissa*, 16 books
	2. *Criminal Proceedings*, 14 books

XIV. Mauricianus
1. *Laws*, 6 books

XV. Terentius Clemens
1. *Laws*, 20 books

XVI. Africanus
1. *Questions*, 9 books

XVII. Marcellus
1. *Digest*, 31 books
2. *Laws*, 6 books
3. *Replies*, sole book

XVIII. Cervidius Scaevola
1. *Digest*, 40 books
2. *Questions*, 20 books
3. *Replies*, 6 books
4. *Rules*, 4 books
5. *Examination of a Slave Household*, sole book
6. *Questions Publicly Discussed*, sole book

XIX. Florentinus
1. *Institutes*, 12 books

XX. Gaius
1. *Provincial Edict*, 32 books
2. *Laws*, 15 books
3. *Urban Edict*, only 10 books found
4. *Golden Words*, 7 books
5. *XII Tables*, 6 books
6. *Institutes*, 4 books
7. *Obligations Assumed by Prescribed Words* (*Verborum Obligationes*), 3 books
8. *Manumissions*, 3 books
9. *Fideicommissa*, 2 books
10. *Problems*, sole book
11. *Rules*, sole book
12. *Matters Relating to Dowry*, sole book
13. *Mortgage*, sole book

XXI. Venuleius
1. *Stipulations*, 19 books
2. *Actions*, 10 books
3. *Duties of Proconsul*, 4 books
4. *Punishments of Villagers*, sole book
5. *Criminal Proceedings*, 3 books
6. *Interdicts*, 6 books

XXII. Tertullianus
1. *Questions*, 8 books
2. *Castrense Peculium*, sole book

XXIII. Justus
1. *Constitutiones*, 20 books

XXIV. Ulpian
1. *Edict*, 83 books
2. *Sabinus*, 51 books
3. *Laws*, 20 books
4. *Disputations*, 10 books
5. *All Seats of Judgment*, 10 books
6. *Duties of Proconsul*, 10 books
7. *Encyclopaedia*, 10 books
8. *Rules*, 7 books
9. *Fideicommissa*, 6 books
10. *Opinions*, 6 books
11. *Adulteries*, 5 books
12. *Appeals*, 4 books
13. *Duties of Consul*, 3 books
14. *Institutes*, 2 books
15. *Rules*, sole book
16. *Census*, 6 books
17. *Replies*, 2 books

Works by the same author, each in a sole book

18. *Betrothals*
19. *Duties of City Prefect*
20. *Duties of Prefect of the City Guard*
21. *Duties of Curator Rei Publicae*
22. *Duties of Praetor Tutelaris*
23. *Duties of Quaestor*

XXV. Paul

1. *Edict*, 80 books
2. *Questions*, 26 books
3. *Replies*, 23 books
4. *Brief Notes*, 23 books
5. *Plautius*, 18 books
6. *Sabinus*, 16 books
7. *Laws*, 10 books
8. *Rules*, 7 books
9. *Rules*, sole book
10. *Views* or *Facta*, 6 books
11. *Views*, 5 books
12. *Vitellius*, 4 books
13. *Neratius*, 4 books
14. *Fideicommissa*, 3 books
15. *Decrees*, 3 books
16. *Adulteries*, 3 books
17. *Handbook*, 3 books
18. *Institutes*, 2 books
19. *Duties of Proconsul*, 2 books
20. *Lex Julia*, 2 books
21. *Lex Aelia Sentia*, 3 books
22. *Rights of the Imperial Treasury*, 2 books
23. *Rules*, sole book
24. *Census*, 2 books

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25. *Punishments of Villagers*
26. *Punishments of Soldiers*
27. *Punishments Prescribed by All Laws*
28. *Usury*
29. *Degrees of Relationship, and Relatives by Marriage*
30. *Law of Codicils*
31. *Exemptions from Tutelage*
32. *Catonian Rule* (*Regula Catoniana*)
33. *Senatus Consultum Orfitianum*
34. *Senatus Consultum Tertullianum*
35. *Senatus Consultum Silanianum*
36. *Senatus Consultum Velleianum*
37. *Senatus Consultum Libonianum or Claudianum*
38. *Duties of Prefect of the City Guard*
39. *Duties of City Prefect*
40. *Duties of Praetor Tutelaris*
41. *Extraordinary Offenses*
42. *Mortgage*
43. *Member of a Municipality*

44. *Criminal Proceedings*
45. *Undutiful Wills*
46. *Trials before the Centumviri*
47. *Ius Singulare* (*Law Issued for the Benefit of a Particular Category of Persons*)
48. *Secundae Tabulae* (*Second Wills*)
49. *A Speech of the Deified Severus*
50. *A Speech of the Deified Marcus*
51. *Lex Vellaea*
52. *Lex Cincia*
53. *Lex Falcidia*
54. *Tacitum Fideicommissum* (*Unexpressed Trust*)
55. *Portions of the Inheritance Allowed to the Children of the Condemned*
56. *Ignorance of Law and of Fact*
57. *Adulteries*
58. *Legacies Instructo and Instrumento* (*Legacies of a House or Land with its Appurtenances*)
59. *Appeals*
60. *Law of Libelli* (*Briefs*)
61. *Wills*
62. *Law of Patronage*
63. *Law of Patronage Derived from the Lex Julia et Papia*
64. *Actions*
65. *Concurrent Actions*
66. *Intercessions of Women*
67. *Gifts between Husband and Wife*
68. *Laws*
69. *Senatus Consulta*
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8. *Undutiful Wills*
9. *Manumissions*
10. *Legacies and Fideicommissa*
11. *Wills*
12. *Advice on Drafting*
13. *Problems Solved*
14. *Distinctions of Dowry*
15. *Marriage Rites*

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XXXIII. Macer
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2. *Criminal Proceedings*, 2 books
3. *Duties of a Governor*, 2 books
4. *The Five Per Cent Inheritance Tax*, 2 books
5. *Appeals*, 2 books

XXXIV. Arcadius
1. *Witnesses*, sole book
2. *Duties of Praetorian Prefect*, sole book
3. *Munera Civilia*, sole book

XXXV. Rufinus
1. *Rules*, 12 books

XXXVI. [Anthus or] Furius Anthianus
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XXXVII. Maximus
1. *Lex Falcidia*

XXXVIII. Hermogenian
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THE DIGEST OF JUSTINIAN

OUR LORD THE MOST HOLY EMPEROR

JUSTINIAN'S

DIGESTS OR PANDECTS

OF THE LAW IN A NUTSHELL

COLLECTED OUT OF EVERY ANCIENT SOURCE

BOOK ONE

1

JUSTICE AND LAW

1 ULPIAN, *Institutes, book 1:* A law student at the outset of his studies ought first to know the derivation of the word *jus*. Its derivation is from *justitia*.[1] For, in terms of Celsus' elegant definition, the law is the art of goodness and fairness. 1. Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties but also indeed under allurement of rewards, and affecting a philosophy which, if I am not deceived, is genuine, not a sham. 2. There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest. Public law covers religious affairs, the priesthood, and offices of state. Private law is tripartite, being derived from principles of *jus naturale, jus gentium,* or *jus civile.* 3. *Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law. 4. *Jus gentium*, the law of nations, is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals whereas *jus gentium* is common only to human beings among themselves.

2 POMPONIUS, *Manual, sole book:* For example, religious duties toward God, or the duty to be obedient to one's parents and fatherland.

3 FLORENTINUS, *Institutes, book 1:* Or the right to repel violent injuries. You see, it emerges from this law (*jus gentium*) that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among

1. *Jus* cannot be exactly translated from Latin into English.

us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another.

4 ULPIAN, *Institutes, book 1:* Manumissions also belong to the *jus gentium.* Manumission means sending out of one's hand, that is, granting of freedom. For whereas one who is in slavery is subjected to the hand (*manus*) and power of another, on being sent out of hand he is freed of that power. All of which originated from the *jus gentium,* since, of course, everyone would be born free by the natural law, and manumission would not be known when slavery was unknown. But after slavery came in by the *jus gentium,* there followed the boon (*beneficium*) of manumission. And thenceforth, we all being called by the one natural name "men," in the *jus gentium* there came to be three classes: free men, and set against those slaves and the third class, freedmen, that is, those who had stopped being slaves.

5 HERMOGENIAN, *Epitome of Law, book 1:* As a consequence of this *jus gentium,* wars were introduced, nations differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring (except for certain contractual elements established through *jus civile*).

6 ULPIAN, *Institutes, book 1:* The *jus civile* is that which neither wholly diverges from the *jus naturale* and *jus gentium* nor follows the same in every particular. And so whenever to the common law we add anything or take anything away from it, we make a law special to ourselves, that is, *jus civile,* civil law. 1. This law of ours, therefore, exists either in written or unwritten form; as the Greeks put it, "of laws some are written, others unwritten."

7 PAPINIAN, *Definitions, book 2:* Now the *jus civile* is that which comes in the form of statutes, plebiscites, *senatus consulta,* imperial decrees, or authoritative juristic statements. 1. Praetorian law (*jus praetorium*) is that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile.* This is also called honorary law (*jus honorarium*), being so named for the high office (*honos*) of the praetors.

8 MARCIAN, *Institutes, book 1:* For indeed the *jus honorarium* itself is the living voice of the *jus civile.*

9 GAIUS, *Institutes, book 1:* All peoples who are governed under laws and customs observe in part their own special law and in part a law common to all men. Now that law which each nation has set up as a law unto itself is special to that particular *civitas* and is called *jus civile,* civil law, as being that which is proper to the particular civil society (*civitas*). By contrast, that law which natural reason has established among all human beings is among all observed in equal measure and is called *jus gentium,* as being the law which all nations observe.

10 ULPIAN, *Rules, book 1:* Justice is a steady and enduring will to render unto everyone his right. 1. The basic principles of right are: to live honorably, not to harm any other person, to render to each his own. 2. Practical wisdom in matters of right is an awareness of God's and men's affairs, knowledge of justice and injustice.

11 PAUL, *Sabinus, book 14:* The term "law" is used in several senses: in one sense,

when law (*jus*) is used as meaning what is always fair and good, it is natural law (*jus naturale*); in the other, as meaning what is in the interest of everyone, or a majority in each *civitas*, it is civil law (*jus civile*). Nor is it the less correct that in our *civitas* the *jus honorarium* is called law. The praetor is also said to render legal right (*jus*) even when he makes a wrongful decree, the reference, of course, being in this case not to what the praetor has done, but to what it is right for a praetor to do. By a quite different usage the term "*jus*" is applied to the place where the law is administered, the reference being carried over from what is done to the place where it is done. That place we can fix as follows: wherever the praetor has determined to exercise jurisdiction, having due regard to the majesty of his own *imperium* and to the customs of our ancestors, that place is correctly called *jus*.

12 MARCIAN, *Institutes, book 1:* We sometimes use the term "*jus*" also with a reference to a bond of relationship: for example, I have a *jus cognationis* (a blood tie) or a *jus adfinitatis* (a tie by marriage) with someone or other.

2

THE ORIGIN OF THE LAW AND OF ALL THE MAGISTRACIES AND THE SUCCESSION OF THE JURISTS

1 GAIUS, *XII Tables, book 1:* Since I am aiming to give an interpretation of the ancient laws, I have concluded that I must trace the law of the Roman people from the very beginnings of their city. This is not because I like making excessively wordy commentaries, but because I can see that in every subject a perfect job is one whose parts hang together properly. And to be sure the most important part of anything is its beginning. Moreover, if it is regarded as a sin (so to speak) for people arguing cases in court to launch straight into an exposition of the case to the judge without having made any prefatory remarks, will it not be all the more unfitting for people who promise an interpretation of a subject to deal straight off with that subject matter, leaving out its beginnings, failing to trace its origin, not even, as I might say, giving their hands a preliminary wash? In fact, if I mistake not, such introductions both lead us more willingly into our reading of the proposed subject matter, and, when we have got to the point, give us a far clearer grasp of it.

2 POMPONIUS, *Manual, sole book:* Accordingly, it seems that we must account for the origin and development of law itself. 1. The fact is that at the outset of our *civitas*, the citizen body decided to conduct its affairs without fixed statute law or determinate legal rights; everything was governed by the kings under their own hand. 2. When the *civitas* subsequently grew to a reasonable size, then Romulus himself, according to the tradition, divided the citizen body into thirty parts, and called them *curiae* on the ground that he improved his curatorship of the commonwealth through the advice of these parts. And accordingly, he himself enacted for the people a number of statutes passed by advice of the *curiae* [*leges curiatae*]; his successor kings legislated likewise. All these statutes have survived written down in the book by Sextus Papirius, who was a contemporary of Superbus, son of Demeratus the Corinthian, and was one of the leading men of his time. That book, as we said, is called *The Papirian Civil Law*, not because Papirius put a word of his own in it, but because he compiled in unitary form laws passed piecemeal. 3. Then, when the kings were thrown out under a Tribuni-

cian enactment, these statutes all fell too, and for a second time, the Roman people set about working with vague ideas of right and with customs of a sort rather than with legislation, and they put up with that for nearly twenty years. 4. After that, to put an end to this state of affairs, it was decided that there be appointed, on the authority of the people, a commission of ten men by whom were to be studied the laws of the Greek city states and by whom their own city was to be endowed with laws. They wrote out the laws in full on ivory tablets and put the tablets together in front of the *rostra*, to make the laws all the more open to inspection. They were given during that year sovereign right in the *civitas*, to enable them to correct the laws, if there should be a need for that, and to interpret them without liability to any appeal such as lay from the rest of the magistracy. They themselves discovered a deficiency in that first batch of laws, and accordingly, they added two tablets to the original set. It was from this addition that the laws of the *Twelve Tables* got their name. Some writers have reported that the man behind the enactment of these laws by the Ten Men was one Hermodorus from Ephesus, who was then in exile in Italy. 5. After the enactment of these laws, there arose a necessity for forensic debate, as it is the normal and natural outcome that problems of interpretation should make it desirable to have guidance from learned persons. Forensic debate, and jurisprudence which without formal writing emerges as expounded by learned men has no special name of its own like the other subdivisions of law designated by name (there being proper names given to these other subdivisions); it is called by the common name "civil law." 6. Then about the same time actions-at-law whereby people could litigate among themselves were composed out of these statutes [the laws of the *Twelve Tables*]. To prevent the citizenry from initiating litigation any old how, the lawmakers' will was that the actions-at-law be in fixed and solemn terms. This branch of-law has the name *legis actiones*, that is, statutory actions-at-law. And so these three branches of law came into being at almost the same time: once the statute law of the *Twelve Tables* was passed, the *jus civile* started to emerge from them, and *legis actiones* were put together from the same source. In relation to all these statutes, however, knowledge of their authoritative interpretation and conduct of the actions at law belonged to the College of Priests, one of whom was appointed each year to preside over private matters. The people followed this practice for nearly a hundred years. 7. Thereafter, when Appius Claudius had written out these actions-at-law and brought them back into a common form, his clerk Gnaeus Flavius, the son of a freedman, pirated the book and passed it over to the people at large. This service so ingratiated him with the citizenry that he became a tribune of the *plebs*, a senator and a curule aedile. The book which contains the actions-at-law is called *The Flavian Civil Law* on the same basis as the above-mentioned *The Papirian Civil Law*, for neither did Gnaeus Flavius put a word of his own into the book. With the beginnings of the growth of the city, and because some types of suit were found to be lacking, Sextus Aelius not much later composed further forms of action and gave to the people the book which is called *The Law according to Aelius* (*Jus Aelianum*). 8. Then, since in the *civitas* there was the statute law of the *Twelve Tables* and on top of that the *jus civile* and on top of that the statutory *legis actiones*, it came to pass that the *plebs* fell at odds with the members of the senatorial class and seceded and set up laws for itself, which laws are called plebiscites. Soon after the *plebs* had been wheedled back, because these plebiscites were giving rise to many disputes, the decision was made in the *lex Hortensia* that they were to be deemed to have the force of statutes. And so it came about that although there was a difference as to the method of passing plebiscites and *leges* (statutes), they had the same legal force. 9. Next, because it grew hard for the *plebs* to assemble, and to be

sure much harder for the entire citizenry to assemble, being now such a vast crowd of men, the very necessity of the case imposed upon the senate trusteeship of the commonwealth. And thus did the senate come to exercise authority, and whatever it resolved upon was respected, and such a law was called a *senatus consultum* (senate resolution). 10. At the same time, the magistrates also were settling matters of legal right, and in order to let the citizens know and allow for the jurisdiction which each magistrate would be exercising over any given matter, they took to publishing edicts. These edicts, in the case of the praetors, constituted the *jus honorarium* (honorary law): "honorary" is the term used, because the law in question had come from the high honor of praetorian office. 11. Most recently, just as there was seen to have been a transition toward fewer ways of establishing law, a transition effected by stages under dictation of circumstances, it has come about that affairs of state have had to be entrusted to one man (for the senate had been unable latterly to govern all the provinces honestly). An emperor, therefore, having been appointed, to him was given the right that what he had decided be deemed law. 12. Thus, in our state either it is laid down by law, that is by statute; or there is our own *jus civile*, which is grounded without formal writing in nothing more than interpretation by learned jurists; or there are statutory actions-at-law, which govern forms of process; or there is plebiscite law, which is settled without the advice and consent of the senate; or there is a magisterial edict, whence honorary law derives; or there is a *senatus consultum* which is brought in without statutory authority solely on the decision of the senate; or there is an imperial enactment (*constitutio*), the principle being that what the emperor himself has decided is to be observed as having statutory force. 13. After this study of the origin and development of law, the next thing to consider is the names and origin of the magistracies. As we have pointed out, business is actually effected through those who preside over some jurisdiction. For how much is it worth that there be law in a *civitas* unless there be people able to administer the laws? Then after that we shall speak of the succession of juristic authorities, because the law cannot be coherent unless there is someone skilled in law by whom it may be from day to day clarified. 14. It is indubitable that from the foundation of the *civitas*, the kings had entire power in all that now pertains to magistrates. 15. In those same times, it is clear that there was also a *tribunus celerum*. It was he who commanded the cavalry and, as it were, stood in second place to the kings. Junius Brutus, who was responsible for getting the kings thrown out, once held this office. 16. Then, after the ejection of the kings, it was established that there be two consuls in whom a statute laid down that the supreme authority should be vested. They were called consuls on this ground, that they first and foremost consulted the interest of the commonwealth. But lest they should claim for themselves kingly power over all things, legislation provided that there should be an appeal from them and that they should have no power to impose the death penalty on a Roman citizen save by the order of the whole citizen body. Alone devolved to them the power of physical coercion and of ordering the imposition of public fetters. 17. Then later, when a census had been too long on the agenda, and the consuls were too few to carry out this study, censors were established. 18. Then, with a growth in population, since wars were growing frequent and some were waged with abnormal ferocity by neighboring peoples, sometimes, under pressure of events, it was decided to establish a magistrate with greater power. Accordingly, dictators were put in office from whom there was no right of appeal and to whom even the capital penalty was entrusted. It was not lawful for this magistrate to be kept in office longer than six months, since he had sovereign power. 19. And these dictators were required to have masters of the cavalry (*magistri equitum*) in just the same way as kings were required to have tribunes of the cavalry (*tribuni celerum*). This office was substantially the same as that of the present day prefects of the praetorian guard (*praefecti praetorio*), the magistrates in question being however considered statutory

officers. 20. At the same time as the secession of the *plebs* from the patricians in about the seventeenth year after the expulsion of the kings, during its stay on the Sacred Mount, the *plebs* established for itself tribunes, to be plebeian magistrates. They were called tribunes, because at one time the citizen body was divided into three parts and the tribunes were elected one from each part, or because the tribes voted them into existence. 21. Likewise, in order that there should be people in charge of the *aedes* (houses) in which the *plebs* deposited all its plebiscites, they appointed two members of the *plebs* who were called aediles. 22. Then, because the public treasury had begun to grow richer, in order that there should be officers in charge of it, quaestors were appointed to have charge of the money, so-called because inquests and savings of money were the reasons for their being brought into existence. 23. And because, as we have said, the consuls were not permitted to take jurisdiction in the capital trial of a Roman citizen save by order of the citizen body, on that account quaestors were appointed by the citizen body in order to preside over capital trials; these were called *quaestores parricidii* of whom there is also a mention in the statute of the *Twelve Tables*. 24. When it had been resolved that statutes were indeed to be passed, it was proposed to the people that all the magistrates should abdicate their offices, in order that the Ten Men might be appointed to produce statute laws in writing. The Ten Men were accordingly appointed. But when they prorogued the magistracy in their own favor and exercised unlawful power and refused in due course to give way to the magistrates, aiming to keep possession of the commonwealth in perpetuity for themselves and their faction, they brought matters to such a pass, by the excesses of their harsh masterfulness, that the army seceded from the commonwealth. One Verginius is said to have taken the initiative in the secession. He had discovered that Appius Claudius, in breach of the very law which he himself had transcribed out of the ancient customary law into the *Twelve Tables*, had refused him [Verginius] interim custody of his own daughter and had awarded interim custody to a man whom Appius had put up to claiming her as his slave, and had been so captivated by lust for the maiden as to have got good and evil quite confused. At this discovery, Verginius was outraged, because over the *persona* of his daughter there had been a lapse from one of the most ancient observances of legal right (as, for example, when Brutus, who was the first consul of Rome, had ordained interim liberation in the case of Vindex, a slave of the Vitellii who had by his evidence uncovered a traitorous conspiracy). Thinking the chastity of his daughter more to be prized than even her life, Verginius snatched a knife from a butcher's shop and slew her with it, doubtless intent upon making the maid's death ward off from her the reproach of whoredom. Fresh from the slaying and still dripping with his daughter's blood, he forthwith took refuge among his army comrades. To a man, they abandoned their former leaders and carried their standards across to the Aventine Mount from Algidum, where the legions had been based for the pursuit of war. Soon the whole body of the city's *plebs* betook itself to the same place, and by popular consent [the Ten Men] were, some of them, [driven into exile; and others were] incarcerated and put to death. 25. Then, several years after the enactment of the *Twelve Tables* legislation, when there was contention between *plebs* and patricians, the *plebs* wishing the right of electing consuls from its own body as well, the patricians rejecting the proposal, the following step was taken: Military tribunes with consular power were created partly from among the plebeians, partly from the patricians. These magistrates as established were variable in number. Sometimes there were twenty of them, sometimes more, occasionally fewer. 26. Later, when the decision had been taken that consuls also might be elected from the *plebs*, elections from both groups began to be the practice. Thereupon, in order that the patricians should have greater legal standing, it was decided that two persons be appointed from among the patricians [to superintend the games]; thus were the curule

aediles brought into being. 27. And when the consuls were being called away to the wars with neighboring peoples, and there was no one in the *civitas* empowered to attend to legal business in the city, what was done was that a praetor also was created, called the urban praetor on the ground that he exercised jurisdiction within the city. 28. Some years thereafter that single praetor became insufficient, because a great crowd of foreigners had come into the *civitas* as well, and so another praetor was established, who got the name peregrine praetor, because he mainly exercised jurisdiction as between foreigners (*peregrini*). 29. Then, since a magistrate was needed to preside over the Spear Court (*hasta*), the Ten Men for trying disputed issues were constituted. 30. At the same time were constituted the Four Men for Care of the Highways and the Three Men of the Mint (the assayers of bronze silver and gold) and the Capital Three Men, the board of guardians of the jail, were constituted so that when a mandatory punishment was to be carried out, it should be done by their agency. 31. And because it was unsuitable for magistrates to be getting into public affairs during the evening hours, there were set up the Five Men for Below the Tiber and the Five Men for Beyond the Tiber, who were empowered to exercise promagisterial authority. 32. The annexation of Sardinia and soon afterward of Sicily and in due course of Spain and finally of the province of Narbonne brought the creation of as many praetors as there were provinces that had come under Roman rule, some of these praetors presiding over affairs of the city, others over provincial affairs. Then, Cornelius Sulla set up criminal courts (*quaestiones publicae*) dealing, for example, with forgery, with parricide, and with stabbings, and he added four further praetors. Next Gaius Julius Caesar set up two praetors and two aediles to oversee the corn supply, and from the name of the Goddess Ceres [these were called] the cereal praetors and aediles. Thus, twelve praetorships and six aedileships were created. Subsequently, the deified Augustus established sixteen praetors, and then later on the deified Claudius added two praetors to exercise fideicommissary jurisdiction. One of those posts has since been suppressed by the deified Titus, and reestablished by the deified Nerva to exercise jurisdiction between the imperial treasury and private citizens. Thus, there are eighteen praetors exercising jurisdiction in the *civitas*. 33. All these points are observed, so long as the magistrates are within the state. But whenever they cross the boundary, one man is left behind to exercise jurisdiction. He is called the prefect of the city (*praefectus urbi*). Formerly, he used to be appointed when the magistrates were away; latterly, he has been installed regularly for the sake of the Latin festivals, and he is appointed every year. The prefect of the corn supply (*praefectus annonae*) and the prefect of the city guard (*praefectus vigilum*) are not magistrates, but hold extraordinary appointments in the public interest. On the other hand, those "Cistiberians" [the Five Men for Below the Tiber] of whom we have spoken, were afterward created aediles by *senatus consultum*. 34. Therefore, in total: ten tribunes of the plebs, two consuls, eighteen praetors, and six aediles administer justice in the *civitas*.

35. Very many very great men have professed knowledge of civil law. But the ones who have been held in highest honor by the Roman people are the ones of whom an account must be given in the present work, to let it be clear by whom—by what quality of men—legal principles have been developed and passed down. As to that, tradition has it that of all those who mastered this knowledge, none earlier than Tiberius Coruncanius made a public profession of it. The others up to his time either thought it right to keep the civil law unknown or made it their practice only to give private consultations rather than offering themselves to people wishing to learn. 36. Yet a man in the first rank for skill was Publius Papirius, who compiled the laws of the kings (*leges regiae*) in a unitary form. Hereafter came Appius Claudius, one of the Ten Men, and the man whose counsel was of the greatest weight in the writing of the *Twelve Tables*. After him Appius Claudius, a member of the same family, had the

greatest knowledge. This man was called Hundred-Handed. He laid down the Appian Way; he built the Claudian Aqueduct; he carried the resolution for not letting Pyrrhus into the city; there is even a tradition that he was the man who first wrote the form of action for cases of interruption of possession, but this book has not survived. The same Appius Claudius invented the letter "R," and from this it seems to have followed that there were Valerii in place of Valesii and Furii in place of Fusii. 37. After their time, the man of greatest knowledge was Sempronius, whom the Roman people called *Sophos* (The Wise), a by-name given to no one else before or since. [Next came] Gaius Scipio Nasica, who was given the title *Optimus* (The Best) by the senate, and to whom was also given by act of state a house on the Via Sacra, so that he could be consulted the more easily. Then, there was Quintus Mucius, who, when he was sent as an ambassador to the Carthaginians and when two dice were offered to him, one for peace and the other for war, for him to choose between them which he wished to take back to Rome, picked them both up and said that the Carthaginians ought to ask him for the one they would prefer to receive. 38. After their time was Tiberius Coruncanius who, as I have stated, was the first to give public discourses. Nothing of his survives in writing, however, though his opinions (*responsa*) were numerous and long remembered. Next Sextus Aelius and his brother Publius Aelius and also Publius Atilius evinced the greatest depth of knowledge in their public teaching. As a result, the two Aelii even became consuls, while Atilius was the first person to whom the people gave the name *Sapiens* (The Wise). Indeed, Ennius wrote in praise of Sextus Aelius, a book of whose survives bearing the title *Tripertita*. This book contains as it were the cradle of the law. It is called the *Tripertita*, since the first part is the *Law of the Twelve Tables*, to which is annexed an interpretation of the law, and then the text is rounded off with a description of the *legis actiones*. There are three other books which reports ascribe to Aelius, but some people deny that ascription, Cato following this latter opinion. Next in line was Marcus Cato, the head of the Porcian family, of whom also some books have survived. But his son wrote more, and from his works subsequent writings descend. 39. After these men came Publius Mucius and Brutus and Manilius, who laid the foundations of the *jus civile*. Of this group, Publius Mucius left as many as ten short books, Brutus seven and Manilius three. There even survive *volumina* (books in the form of rolls) of Manilius. The two former held consular rank, Brutus having served as praetor, Publius Mucius however having actually been *pontifex maximus* (chief priest). 40. These men's pupils included Publius Rutilius Rufus, who was a consul in Rome and a proconsul in Asia Minor, Paulus Verginius, and Quintus Tubero, the well-known stoic who studied under Pansa and who was himself a consul. Sextus Pompeius, too, the paternal uncle of Gnaeus Pompeius, flourished at the same time, as did Coelius Antipater, who wrote histories, but who put more effort into literary style than into legal science, and also Lucius Crassus, brother of Publius Mucius, who has the by-name Munianus. Cicero said that he was the best speaker of all the

jurisconsults. 41. After that group, Quintus Mucius, son of Publius and a *pontifex maximus*, became the first man to produce a general compendium of the civil law by arranging it into eighteen books. Mucius had several pupils, but those who achieved the highest standing were Aquilius Gallus, Balbus Lucilius, Sextus Papirius, and Gaius Juventius. Of them, Gallus had the highest popular standing, according to Servius. All, however, are mentioned by name in works of Servius Sulpicius; apart from that, writings of theirs which survive are not in themselves of such quality that everyone is always searching them out; indeed, their pages are hardly ever turned over by human hand. But Servius relied on them in writing his own books, and our remembering them in fact depends on his writings. 43. According to the traditional story, however, when Servius Sulpicius held the first place as a pleader of cases or to be sure the first place after Marcus Tullius [Cicero], he once sought out Quintus Mucius to consult him about the business of a client of his. When Servius failed to understand Quintus's opinion on the law, he questioned Quintus again; again an opinion was given, and again not understood; then he was severely reproached by Quintus. For, indeed, he told him that it was disgraceful for a patrician of noble family who regularly appeared as advocate in courts to be ignorant of the law on which his cases turned. Stung by this near insult, Servius applied himself to learning the civil law, and he especially studied under the men of whom we have spoken. He had lessons from Balbus Lucilius, but most of all he was taught by Gallus Aquilius, who was living at Cercina. That is why several of his surviving books were composed at Cercina. When Servius died during a period of acting as an ambassador, the people of Rome put up a statue of him in front of the *rostra*, and that statue still stands before the *rostra* of Augustus. Several volumes of his survive, but he left almost one hundred eighty books. 44. Many men got their learning under him, of whom the following wrote books: Alfenus Varus Gaius, Aulus Ofilius, Titus Caesius, Aufidius Tucca, Aufidius Namusa, Flavius Priscus, Gaius Ateius, Pacuvius Labeo Antistius, the father of Labeo Antistius, Cinna, and Publicius Gellius. Of these ten, eight composed books, and Aufidius Namusa edited all their complete books into a set of one hundred forty books. Alfenus Varus and Aulus Ofilius enjoyed the highest authority of Servius's pupils. Varus indeed became a consul, while Ofilius always kept his equestrian rank. He was on the friendliest of terms with Caesar, and he left behind very many civil law books such as would give the basis for every branch of study. He was the first person to write up the statutes on the five percent tax; he also was the first to give a careful account of the praetor's edict with regard to jurisdictional questions, although Servius had before him left two books dedicated to Brutus, exceedingly brief ones, entitled *On the Edict*. 45. At the same time too lived Trebatius, the one who was a pupil of Cornelius Maximus; also Aulus Cascellius, pupil of

Quintus Mucius Volusius, whose grandson Publius Mucius he actually made his testamentary heir as a mark of honor to Quintus Mucius. Aulus Cascellius was of quaestorian rank, and he refused to go higher even though Augustus offered him the consulship. Of those two, Trebatius is said to have been the more skillful lawyer, but Cascellius to have been the more eloquent pleader; but Ofilius was more learned than either of them. Cascellius's writings have not survived, except for one book of *bons mots*; quite a few of Trebatius's books survive, but nowadays they are little consulted. 46. Quintus Tubero was later than these men. He studied under Ofilius. He was a patrician, and he transferred his attention from pleading cases as advocate to consulting on the civil law, in particular after he had prosecuted Quintus Ligarius but failed to get a conviction before Gaius Caesar. Quintus Ligarius was the man who, as commander on the African coast, withheld permission for Tubero to land when he was ill or to swallow water. That was the ground on which Tubero prosecuted him and Cicero defended him. Cicero's speech survives—certainly a very stylish one. It bears the title *Pro Quinto Ligario*. Tubero was considered most learned both in public and in private law, and he left several books in both fields of study. But he had an affection of writing in an antique style of speech, and so his books are not considered very agreeable reading. 47. After him, the leading authorities were Ateius Capito, who was of Ofilius's school, and Antistius Labeo, who went to lectures of all the above, but who was a pupil of Trebatius. Of these two Ateius was consul. Labeo declined to accept office when Augustus made him an offer of the consulship whereby he would have become *consul suffectus* (interim consul). Instead, he applied himself with the greatest firmness to his studies, and he used to divide up whole years on the principle that he spent six months at Rome with his students, and for six months he retired from the city and concentrated on writing books. As a result, he left four hundred manuscript rolls (*volumina*) most of which are still regularly thumbed through. These two men set up for the first time rival sects, so to say. For Ateius Capito persevered with the line which had been handed down to him, whereas Labeo set out to make a great many innovations on account of the quality of his genius and the trust he had in his own learning which had drawn heavily on other branches of knowledge. 48. And so when Ateius Capito was succeeded by Massarius Sabinus and Labeo by Nerva, these two increased the above-mentioned range of disagreements. Nerva was also on the most intimate terms with Caesar. Massurius Sabinus was of equestrian rank, and was the first person to give state-certificated opinions (*publice respondere*). For after this privilege (*beneficium*) came to be granted, it was conceded to him by Tiberius Caesar. 49. To clarify the point in passing: before the time of Augustus the right of stating opinions at large was not granted by emperors, but the practice was that opinions were given by people who had confidence in their own studies. Nor did they always issue opinions under seal, but most commonly wrote themselves to the judges, or gave the testimony of a direct answer to those who consulted them. It was the deified Augustus who, in order to enhance the authority of the law, first established that opinions might be given under his authority. And from that time this began to be sought as a favor. As a consequence of this, our most excellent emperor Hadrian issued a rescript on an occasion when some men of praetorian rank were petitioning him for permission to grant opinions; he said that this was by custom not merely begged for but earned and that he [the emperor] would accordingly be delighted if whoever had faith in himself would prepare himself for giving opinions to the people at large. 50. Anyway, to Sabinus the concession was granted by Tiberius Caesar that he might give opinions to the people at large. He was admitted to the equestrian rank when already of mature years

and almost fifty. He never had substantial means, but for the most part was supported by his pupils. 51. His successor was Gaius Cassius Longinus, the son of a daughter of Tubero's who was herself a granddaughter of Servius Sulpicius; this is why he speaks of Servius Sulpicius as his great grandfather. He was consul along with Quartinus in Tiberius's time, but his was the greatest authority in the state right up to the time when Caesar banished him. 52. Banished by Tiberius to Sardinia, he lived to be recalled by Vespasian. Nerva's successor was Proculus. There lived at the same time also Nerva the younger and another Longinus, a member of the equestrian rank who however subsequently attained the praetorship. But Proculus's authority was superior to the others, for he was a man of the greatest ability. So [lawyers of] the one party were called Cassians and [those] of the other were called Proculians, a division which in origin began with Capito and Labeo. 53. Caelius Sabinus succeeded Cassius, and he exercised the greatest influence in Vespasian's times. Proculus's successor was Pegasus, who was prefect of the city in Vespasian's times. Caelius Sabinus was succeeded by Priscus Iavolenus; Pegasus by Celsus, and Celsus the Elder by Celsus the Younger and Priscus Neratius, both of whom were consuls, Celsus indeed serving a second term. Javolenus Priscus was succeeded by Aburnus Valens and Tuscianus, also by Salvius Julianus.

3

STATUTES, *SENATUS CONSULTA*, AND LONG-ESTABLISHED CUSTOM

1 PAPINIAN, *Definitions, book 1:* A statute is a communal directive, a resolution of wise men, a forcible reaction to offenses committed either voluntarily or in ignorance, a communal covenant of the state.

2 MARCIAN, *Institutes, book 1:* For Demosthenes the orator also defines it thus: "Law is that which all men ought to obey for many reasons, and chiefly because all law is a discovery and gift of God, and yet at the same time is a resolution of wise men, a correction of misdeeds both voluntary and involuntary, and the common agreement of the *polis* according to whose terms all who live in the *polis* ought to live." Chrysippus too, a philosopher of supreme stoic wisdom, begins his book *On Law* in the following terms: "Law is sovereign over all divine and human affairs. It ought to be the controller, ruler, and guide of good and bad men alike, and in this way to be a standard of justice and injustice and, for beings political, by nature a prescription of what ought to be done and a proscription of what ought not to be done."

3 POMPONIUS, *Sabinus, book 25:* Rules of law should be established, as Theophrastus said, in the matters which happen by way of general occurrence, not for those which happen against the normal run of things.

4 CELSUS, *Digest, book 5:* Out of those matters whose occurrence in one kind of case is a bare possibility, rules of law do not develop.

5 CELSUS, *Digest, book 17:* For the law ought rather to be adapted to the kinds of things which happen frequently and easily, than to those which happen very seldom.

6 PAUL, *Plautius, book 17:* For, as Theophrastus says, a thing that happens once or twice is passed over by the lawgivers.

7 MODESTINUS, *Rules, book 1:* The force of a law is this: to command, to prohibit, to permit, or to punish.

8 ULPIAN, *Sabinus, book 3:* Rules of law are set up not as against single individuals, but in generic terms.

9 ULPIAN, *Edict, book 16:* There is no doubt that the senate has law-making power.

10 JULIAN, *Digest, book 58:* Neither statutes nor *senatus consulta* can be written in such a way that all cases which might at any time occur are covered; it is however sufficient that the things which very often happen are embraced.

11 JULIAN, *Digest, book 90:* And, therefore, as to matters on which decisions of first impression have been made, more exact provision must be made either by [juristic] interpretation or by a legislative act of our most excellent emperor.

12 JULIAN, *Digest, book 15:* It is not possible for every point to be specifically dealt with either in statutes or in *senatus consulta*; but whenever in any case their sense is clear, the president of the tribunal ought to proceed by analogical reasoning and declare the law accordingly.

13 ULPIAN, *Curule Aediles' Edict, book 1:* For, as Pedius says, whenever some particular thing or another has been brought within statute law, there is good ground for other things which further the same interest to be added in supplementation, whether this be done by [juristic] interpretation or *a fortiori* by judicial decision.

14 PAUL, *Edict, book 54:* Yet a ruling adopted against the *ratio juris* (the underlying rationale of the law) ought not to be carried to its logical conclusion.

15 JULIAN, *Digest, book 27:* We cannot follow a rule of law in instances where there has been a decision against the *ratio juris*.

16 PAUL, *De Jure Singulari, sole book: Jus singulare* (particular law) is law brought in by authority of a decision maker against the general tenor of legal reason on account of a specific policy goal.

17 CELSUS, *Digest, book 26:* Knowing laws is not a matter of sticking to their words, but a matter of grasping their force and tendency.

18 CELSUS, *Digest, book 29:* Statutes ought to be given the more favorable interpretation, whereby their intendment is saved.

19 CELSUS, *Digest, book 33:* When there is an ambiguity in a statute, that sense is to be preferred which avoids an absurdity, especially when by this method the intendment of the act is also secured.

20 JULIAN, *Digest, book 55:* It is not possible to find an underlying reason for everything which was settled by our forebears.

21 NERATIUS, *Parchments, book 6:* Accordingly, it is not right to go ferreting after the motives behind the things which are settled as law. To do otherwise is to subvert many present certainties.

22 ULPIAN, *Edict, book 35:* When a law pardons something as to the past, it impliedly forbids it for the future.

23 PAUL, *Plautius, book 4:* We should certainly not change points which have always had a single definite interpretation.

24 CELSUS, *Digest, book 8:* It is not lawyer-like practice to give judgment or to state an opinion on the basis of one particular part of a statute without regard to the whole.

25 MODESTINUS, *Replies, book 8:* It is not allowable under any principle of law or generous maxim of equity that measures introduced favorably to men's interests should be extended by us through a sterner mode of interpretation on the side of severity and against those very interests.

26 PAUL, *Questions, book 4:* It is not an innovation to reconcile earlier laws with later ones.

27 TERTULLIAN, *Questions, book 1:* Accordingly, because the practice is to read earlier laws in the light of later ones, we ought always to deem it already inherent in statutes that they refer also to those persons and those things which may at any time turn out analogous [with persons and things expressly referred to].

28 PAUL, *Lex Julia et Papia, book 5:* But later laws also refer to earlier ones, unless they contradict them; there are many proofs of this.

29 PAUL, *Lex Cincia, sole book:* It is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense.

30 ULPIAN, *Edict, book 4:* Fraud on the statute is practiced when one does what the statute does not wish anyone to do yet which it has failed expressly to prohibit. And what separates "words from meaning" separates cheating from what is done contrary to law.

31 ULPIAN, *Lex Julia et Papia, book 13:* The emperor is not bound by statutes. And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves.

32 JULIAN, *Digest, book 84:* What ought to be held to in those cases where we have no applicable written law is the practice established by customs and usage. And if this is in some way deficient, we should hold to what is most nearly analogical to and entailed by such a practice. If even this is obscure, then we ought to apply law as it is in use in the City of Rome. 1. Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be established by use and wont. For given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.

33 ULPIAN, *Office of Proconsul, book 1:* Everyday usage ought to be observed in place of legal right and statute law in relation to those matters which do not come under the written law.

34 ULPIAN, *Duties of Proconsul, book 4:* When it appears that somebody is relying upon a custom either of a *civitas* or of a province, the very first issue which ought to be explored, according to my opinion, is whether the custom has ever been upheld in contentious proceedings.

35 HERMOGENIAN, *Epitome of Law, book 1:* But we also keep to those rules which have been sanctioned by long custom and observed over very many years; we keep to them as being a tacit agreement of the citizen, no less than we keep to written rules of law.

36 PAUL, *Sabinus, book 7:* This kind of law is held to be of particularly great authority, because approval of it has been so great that it has never been necessary to reduce it to writing.

37 PAUL, *Questions, book 1:* If a question should arise about the interpretation of a statute, what ought to be looked into first is the law that the *civitas* had previously applied in cases of the same kind. For custom is the best interpreter of statutes.

38 CALLISTRATUS, *Questions, book 1:* In fact, our reigning Emperor Severus has issued a rescript to the effect that in cases of ambiguity arising from statute law, statutory force ought to be ascribed to custom or to the authority of an unbroken line of similar judicial decisions.

39 CELSUS, *Digest, book 23:* A proposition does not hold good in analogical cases if it was not originally brought in on a rational ground, but adhered to in the first place in error and thereafter by custom.

40 MODESTINUS, *Rules, book 1:* Accordingly, every rule of *jus* is either made by agreement or established by necessity or built up by custom.

41 ULPIAN, *Institutes, book 2:* A complete *jus* (right) is either of acquiring or of keeping or of reducing; for the question is either how something may come to be somebody's or how a person may keep a thing or keep his *ius* or how he may alienate or lose it.

4

ENACTMENTS BY EMPERORS

1 ULPIAN, *Institutes, book 1:* A decision given by the emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority and power, doing this by the *lex regia* which is passed anent his authority. 1. Therefore, whatever the emperor has determined by a letter over his signature or has decreed on judicial investigation or has pronounced in an interlocutory matter or has prescribed by an edict is undoubtedly a law. These are what we commonly call *constitutiones* (enactments). 2. Plainly, some of these are purely *ad hominem* and are not followed as setting precedents. For only the specific individual is covered by an indulgence granted by the emperor to someone according to his deserts or by a penalty specially imposed or by a benefit granted in an unprecedented way.

2 ULPIAN, *Fideicommissa, book 4:* In determining matters anew, there ought to be some clear advantage in view, so as to justify departing from a rule of law which has seemed fair since time immemorial.

3 JAVOLENUS, *Letters, book 13:* A benefit from the emperor, since it proceeds from his undoubtedly divine generosity, ought to be interpreted as amply as possible.

4 MODESTINUS, *Excuses, book 2:* Later enactments are more forceful than earlier ones.

5

HUMAN STATUS

1 GAIUS, *Institutes, book 1:* All our law concerns [either] persons or things or actions.

2 HERMOGENIAN, *Epitome of Law, book 1:* Therefore, since all law is established for men's sake, we shall speak first of the status of persons and afterward about the rest [of the law], following the order of the *edictum perpetuum* and applying titles as nearly as possible compatible with these as the nature of the case admits.

3 GAIUS, *Institutes, book 1:* Certainly, the great divide in the law of persons is this: all men are either free men or slaves.

4 FLORENTINUS, *Institutes, book 9:* Freedom is one's natural power of doing what one pleases, save insofar as it is ruled out either by coercion or by law. 1. Slavery is an institution of the *jus gentium,* whereby someone is against nature made subject to the ownership of another. 2. Slaves (*servi*) are so-called, because generals have a custom of selling their prisoners and thereby *preserving* rather than killing them: and indeed they are said to be *mancipia,* because they are *captives* in the hand (*manus*) of their enemies.

5. MARCIAN, *Institutes, book 1:* Of slaves, to be sure, there is but a single condition; of free men, on the other hand, some are freeborn (*ingenui*) and some are freedmen. 1. People are brought under our power as slaves either by the civil law or by the *jus gentium.* This happens by civil law if someone over twenty years of age allows himself to be sold with a view to sharing in the price. By the *jus gentium,* people become slaves on being captured by enemies or by birth to a female slave. 2. The freeborn are those who are born of a free woman; it suffices that she was free at the time of birth, even though she was a slave at the time of conception. And in the converse case, if a woman conceives as a free person then gives birth as a slave, it has been decided that her child is born free (and it does not matter whether she conceived in lawful wedlock or in simple cohabitation), because the mother's calamity should not redound to the harm of the child within her. 3. Further to this, the following question has been raised: suppose a pregnant slave is manumitted, then later becomes a slave or is expelled from her *civitas* before she gives birth, is her offspring free or slave? The better view, however, is that he or she is born free, and that it is enough for the child in the womb to have had a free mother albeit only for some of the time between conception and birth.

6 GAIUS, *Institutes, book 1:* Freedmen are those who have been manumitted from lawful slavery.

7 PAUL, *Shares Which Are Allowed to the Children of Condemned Prisoners, sole book:* The fetus in the womb is deemed to be fully a human being, whenever the question concerns advantages accruing to him when born, even though before birth his existence is never assumed in favor of anyone else.

8 PAPINIAN, *Questions, book 3:* The Emperor Titus Antoninus rules in a rescript that the status of free people is not adversely affected by the bearing of a badly drafted instrument.

9 PAPINIAN, *Questions, book 31:* There are many points in our law in which the condition of females is inferior to that of males.

10 ULPIAN, *Sabinus, book 1:* Question: with whom is a hermaphrodite comparable? I rather think each one should be ascribed to that sex which is prevalent in his or her make-up.

11 PAUL, *Replies, book 18:* Paul gave the opinion that a person is not deemed the lawful son of the man who begot him in the following case: he was conceived during the lifetime of his mother's father, the father being ignorant of his daughter's copulation; it was irrelevant that the birth occurred after the grandfather's death.

12 PAUL, *Replies, book 19:* That a child can be born fully formed in the seventh month is now a received view due to the authority of that most learned man Hippocrates. Accordingly, it is credible that a child born in the seventh month of a lawful marriage is a lawful son of the marriage.

13 HERMOGENIAN, *Epitome of Law, book 1:* Suppose that a slave is committed by his master to trial on a capital charge. Even if he is acquitted, he does not become a free man.

14 PAUL, *Views, book 4:* Not included in the class of children are those abnormally procreated in a shape totally different from human form, for example, if a woman brings forth some kind of monster or prodigy. But any offspring which has more than the natural number of limbs used by man may in a sense be said to be fully formed, and will therefore be counted among children.

15 TRYPHONINUS, *Disputations, book 10:* There was a testamentary instruction that if Arescusa should bear three children she should be free. She bore one child at the first birth, but triplets at the second. The question is whether any and if so which of the triplets is free. The condition set upon her freedom must be fulfilled by the woman. There should, however, be no doubt but that the last triplet is born free. Nor indeed has nature allowed that two babies can get out of their mother's womb at the same time with one push, so that from the uncertain order of their being born, there is no way of telling which is born in slavery and which in freedom. Therefore, from the onset of labor, the postulated condition has the effect that the one born last comes forth out of a free woman, just as if any other condition whatever had been set for her freedom and had come to pass while she was giving birth. For example, she is manumitted subject to this condition, that she give ten thousand to the heir or to Titius, and at the very moment of her labor, she fulfills the condition by the hand of another. In that case, it must be supposed that she gave birth as a free woman.

16 ULPIAN, *Disputations, book 6:* The answer would be the same, if Arescusa first bore two children and then had twins. For the point is that it cannot be said that both twins are born as free born; only the second born is. So the question is one of fact rather than of law.

17 ULPIAN, *Edict, book 22:* Everyone in the Roman world has been made a Roman citizen as a consequence of the enactment of the Emperor Antoninus.

18 ULPIAN, *Sabinus, book 27:* The Emperor Hadrian in a rescript to Publicius Marcellus gave the ruling that the child of a free woman, who has been condemned to death while pregnant, is born free, and that the practice is to keep her alive until she has given birth. But it is also the case that if a woman upon whom the interdict by fire and water has been imposed gives birth to a child conceived in lawful wedlock, the child is a Roman citizen and is in the *potestas* of its father.

19 CELSUS, *Digest, book 29:* When nuptials have been carried out in the statutory form, the children follow their father; one begotten at large follows the mother.

20 ULPIAN, *Sabinus, book 38:* A person who has become insane is held to retain his previous status and dignity, and also his position as a magistrate and his power, just as he retains ownership of his own property.

21 MODESTINUS, *Rules, book 7:* A freeman who sells himself and is later manumitted does not then revert to the status which by his own act he quit; he acquires the condition of a freedman.

22 MODESTINUS, *Replies, book 12:* Herennius Modestinus gave the opinion that the child born of a slave-woman is free born if her labor occurred at a time when, according to a condition of a gift, she ought to have been manumitted, since by rights she should then have been free.

23 MODESTINUS, *Encyclopaedia, book 1:* People who cannot identify their father are said to have been conceived at large, as are indeed those who can identify their father but have one whom they could not lawfully have. They are also called bastards, *spurii*, from the Greek word *spora*, being bastards by conception.

24 ULPIAN, *Sabinus, book 27:* This is a law of nature: that a child born without lawful wedlock belongs to his mother unless a special statute provides otherwise.

25 ULPIAN, *Lex Julia et Papia, book 1:* We must accept that someone is free born if there is a judicial decision to that effect, even though he is actually a freedman. For the judgment of a court (*res judicata*) is deemed true.

26 JULIAN, *Digest, book 69:* For almost all purposes of civil law, children *in utero* are considered as existent beings. Even *hereditates legitimae* revert to them; and if a pregnant woman is taken prisoner by enemies, the child to be born has the right of *postliminium*, and accordingly follows the rank of his father or (as the case may be) his mother. Moreover, if a pregnant slave-woman is stolen, then although it is a purchaser in good faith who has possession of her when she gives birth, the child to be born is deemed stolen property and not subject to *usucapio*. By analogy to all this, it is also the case that a freedman, so long as a son of his patron might possibly be born, is subject to the régime which applies to those who have patrons.

27 ULPIAN, *Opinions, book 5:* A patron could not even by adoption make a freeborn individual of a person who confesses himself to be a freedman.

6

THOSE WHO ARE *SUI JURIS* AND THOSE WHO ARE *ALIENI JURIS*

1 GAIUS, *Institutes, book 1:* There follows another division within the law of persons: some persons are *sui juris*, others are within the jurisdiction of someone else. Let us, therefore, see who are subject to another's jurisdiction (*alieni juris*). If we ascertain

who these persons are, then at the same time we know who are *sui juris*. So let us take a view of those who are in another person's *potestas*. 1. Slaves, then, are in the *potestas* of their master, this form of *potestas* being power in virtue of the *jus gentium*. For we can observe that equally among all nations masters have had the power of life or death over their slaves. And whatever acquisitions are made through a slave are acquisitions of the master's. 2. But at the present time no men who are subject to Roman rule are permitted to treat their slaves with a severity which is excessive and without statutory cause shown. For under an enactment of the deified Antoninus it is obligatory that he who has killed his own slave without due cause be punished not less severely than one who has killed another's slave. But even too great cruelty of masters is restrained by an enactment of the same emperor.

2 ULPIAN, *Duties of Proconsul, book 8:* If a master savages his slave or forces him into committing some indecency and foul malpractice, the functions of the governor are declared in the rescript addressed by the deified Pius to Aelius Marcianus, proconsul of Baetica. Here are the terms of the rescript: "The power of masters over their slaves certainly ought not to be infringed and there must be no derogation from any man's legal rights. But it is in the interest of masters that those who make just complaint be not denied relief against brutality or starvation or intolerable wrongdoing. Therefore, judicially examine those who have fled the household of Julius Sabinus to take refuge at the statue and if you find it proven that they have been treated more harshly than is fair or have been subjected to infamous wrongdoing, then issue an order for their sale subject to the condition that they shall not come back under the power of their present master. And if he should practice fraudulent evasion of my determination [on this point], let him understand that I shall bring more severe retribution on the deed."

The deified Hadrian also once ordered the relegation of one Umbricia, a lady of family, for the five-year census period on the ground that she had for the most trifling reasons subjected her serving women to appalling treatment.

3 GAIUS, *Institutes, book 1:* Also in our *potestas* are our children whom we have begotten in lawful wedlock. This right over our children is peculiar to Roman citizens.

4 ULPIAN, *Institutes, book 1:* For of Roman citizens some are heads of households (*patres familiarum*), some are sons-in-power (*filii familiarum*), some are female heads of households (*matres familiarum*), and some are daughters-in-power (*filiae familiarum*). Heads of households are those who are in their own power (*potestas*), whether they are over or under the age of puberty; female heads of households are in like case; sons-in-power and daughters are persons who are in someone else's power. For whoever is born of me and my wife is in my power: likewise, whoever is born of my son and his wife, that is, my grandson or granddaughter, is by the same token in my power, and my great-grandson and great-granddaughter, and so on down the generations.

5 ULPIAN, *Sabinus, book 36:* When a grandfather dies, his grandchildren through his son normally fall within the power of that son, that is, of their own father; in the same way also, great grandchildren and so on either come into the power of that son, if he is alive and has remained within the family, or they come into the power of that ancestor who is above them within the *potestas*. This rule applies not only in the case of natural children but also in the case of adoptive ones.

6 ULPIAN, *Sabinus, book 9:* Our definition of son is he who is born of a man and his wife. But if we suppose that a husband has been away for a spell, let us say, ten years, and has on his return found a year old boy in his house, we agree with Julian's opinion that this child is not the son of the husband. Julian, on the other hand, says that we should not listen to someone who has stayed constantly with his wife but who refuses to recognize her child as his own. But on this my opinion, which Scaevola also holds, is that a child born in a man's house even with full knowledge of the neighbors is not that man's son if it is proved that the husband for some time has not slept with his wife because of the onset of an infirmity or for any other reason or if the state of health of the head of the household (*pater familias*) was such that he had become impotent.

7 ULPIAN, *Sabinus, book 25:* If some penalty has been inflicted on a father [who is a son-in-power] whereby he loses his citizenship or is penally enslaved, there is no doubt that the grandson succeeds to the position of that son.

8 ULPIAN, *Sabinus, book 26:* Though a man be insane, his children are nevertheless in his power. The same, indeed, goes for all parents who have children in power. For since the right of power over one's family has been established by received custom and since nobody can resign his power, save if children have left the family in those cases determined by usage, it is utterly indubitable that the people we were speaking about remain in power. Accordingly, he will not only have in his power those children whom he begot before his madness but also any who were conceived before, but born during, his period of madness. But what if while he is mad his wife conceives by his agency? The question is whether in this case the son is born into his power. Well, although a madman is not able to take a woman as his wife, yet he is able to retain his married status. And since this is the case, he shall have that son in his power. Further, if the wife becomes mad, the child conceived by her before her insanity is born in power. But also the child conceived during her insanity, her husband being not mad, is undoubtedly born in power, because the marriage remains in force. But even if both man and wife were to be insane at the time of intercourse and she were then to conceive, the offspring would be born in the father's power as if the last traces of free will remained alive in them when insane. For since the marriage stands when one or other is mad, it stands when both are. 1. The father who is mad does indeed so fully retain his legal power that there still accrues to him the beneficial interest in whatever his son has acquired.

9 POMPONIUS, *Quintus Mucius, book 16:* The son-of-a-family (*filius familias*) is deemed to be a head of household (*pater familias*) for purposes of state, for example, in order that he may act as a magistrate or may be appointed a tutor.

10 ULPIAN, *Lex Julia et Papia, book 4:* If a judge has ordained that nurture or aliment ought to be forthcoming, it must be said that it remains an open question as to the truth of the matter whether this be this man's lawful son or not. For, indeed, an action of alimentation raises no presumption as to the truth of that.

11 MODESTINUS, *Encyclopaedia, book 1:* Illegitimate or emancipated sons cannot be brought back into paternal power against their will.

7

ADOPTIONS AND EMANCIPATIONS AND THE OTHER FORMS OF RELEASE FROM POWER

1 MODESTINUS, *Rules, book 2:* Sons-in-power can be made such not only by nature but also by forms of adoption. The term "adoption" denotes a genus, which is divided into two species, of which one is called by the same word "adoption," the other *adrogatio.* Sons-in-power are subject to adoption; people who are *sui juris*, to *adrogatio.*

2 GAIUS, *Institutes, book 1:* Adoption in the generic sense occurs in two ways: either

by the emperor's authority or by command of a magistrate. It is by the emperor's authority that we adopt people who are *sui juris*. This species of adoption is called *adrogatio* because, on the one hand, the adopter is rogated, that is, asked, if he wishes the person he is about to adopt to be his own lawful son, and, on the other, the adoptee is rogated if he will allow that to happen. It is by command of a magistrate that we adopt people who are in the power of their own parent, whether being children of the first degree, as are son and daughter, or being of some lower degree, as grandson, granddaughter, or great-grandson, great-granddaughter. 1. The thing which both modes of adoption have in common is that even those who cannot have children of their own, for example, eunuchs, can adopt. The thing which is peculiar to the adoption of the kind which is effected through the emperor is that if a person who has children in his power gives himself to be adrogated, not only is he himself subjected to the power of the adrogator but so also are his children brought into the *potestas* of the same man as though they were his grandchildren.

3 PAUL, *Sabinus, book 4:* If a consul or a colonial governor is a son-in-power, it is established that he can be either emancipated or given in adoption in his own court.

4 MODESTINUS, *Rules, book 2:* It is Neratius's opinion that a magistrate before whom a statutory action-at-law (*legis actio*) is competent has power both to emancipate his own sons and to give them in adoption in his own court.

5 CELSUS, *Digest, book 28:* In adoptions, inquiry is made as to their wishes only of those who are *sui juris*. But if people are being given by their father into adoption, in relation to them the choice of both parties must be considered through their consenting or their failing to make objection.

6 PAUL, *Edict, book 35:* Whenever a grandson is adopted on the fiction that he is born of one's son, the son's consent is needed. Julian also writes in the same sense.

7 CELSUS, *Digest, book 39:* In a case of adoption, it is not necessary to secure authority for it from those among whom agnatic ties consequently come into being.

8 MODESTINUS, *Rules, book 2:* The rule previously in force that a curator's authorization should not be interposed in an *adrogatio* was rightly changed in the reign of the deified Claudius.

9 ULPIAN, *Sabinus, book 1:* Even a blind man can adopt or be adopted.

10 PAUL, *Sabinus, book 2:* If someone adopts a grandson on the fiction that he is born of a son whom he has in power, the son consenting to the adoption, he is not deemed to be born to the grandfather as *suus heres*, in as much as, on the death of the grandfather, he falls into the power of his own father.

11 PAUL, *Sabinus, book 4:* In the following case, an adoptive grandson does not come into the *potestas* of the deceased's son on the death of the grandfather: a person who had a son had afterward adopted a grandson as if he were that son's son, but the son's authorization was not secured.

12 ULPIAN, *Sabinus, book 14:* Someone who has been set free from his father's power cannot afterward honorably return into his power except by adoption.

13 PAPINIAN, *Questions, book 36:* In relation to practically every right, on the termination of the power of an adoptive father no trace of the past is left. Hence, paternal rank acquired by adoption is given up on the cessation of the adoptive relationship.

14 POMPONIUS, *Sabinus, book 5:* But even a grandson conceived and born of a son in the house of his adoptive father loses all rights through emancipation.

15 ULPIAN, *Sabinus, book 26:* If a head of household (*pater familias*) should be adopted, everything which belonged to him and which can be claimed by him is by tacit operation of law transferred to his adopter. Stating this more fully: his children who are in his power go with him. But also those of his children who by right of *postliminium* return [to full citizenship from being enslaved by an enemy] or who were *in utero* at the time of *adrogatio* are likewise brought into the power of the adrogator. 1. If a man who has two sons and has a grandson by each of them wishes to adopt one of the grandsons on the fiction that he is the son of the other son, he can do this by emancipating the grandson and then adopting him on the fiction that he is the son of the other son. For he does this as anyone at all, not as grandfather, and since the *rationale* is that he can adopt the child as though he were born of anyone at all, so also he can adopt the child as if born of the other son. 2. In cases of *adrogatio*, the scrutiny of the court is directed to the question whether perhaps the adrogator is less than sixty years old, because then he should rather be attending to begetting his own children—unless it should so happen that sickness or health is an issue in the case or there is some other just ground for *adrogatio*, such as his being related to the person he wishes to adopt. 3. Likewise, one ought not to adrogate several people unless on some just ground. And *adrogatio* of someone else's freedman or of an older person by a younger is out of the question.

16 JAVOLENUS, *From Cassius, book 6:* For adoption may take place as between those persons for whom the natural relationship could in principle hold good.

17 ULPIAN, *Sabinus, book 26:* Nor is it permissible for anyone to adrogate one whose affairs he has administered as tutor or curator, if the person to be adrogated is less than twenty-five years old. This is to obviate the risk of someone adrogating in order to avoid the duty of rendering accounts. Likewise, there must always be inquiry to forestall the risk of there being some immoral reason for adrogation. 1. Adrogation of *pupilli* is permissible only by those whom a natural blood tie or the most pure-minded affection has induced to think of adoption. In all other cases, it is banned, lest it lie in the power of tutors both to bring their tutorship to an end and to terminate a testamentary substitution made by a parent. 2. So in the very first place, there must be investigation as to the means of the *pupillus* and of the person who would like to adopt him, in order to found on a comparison of these a judgment whether the proposed adoption can be supposed beneficial to the *pupillus*. Second, it must be ascertained what way of life the person has who wants to bring a *pupillus* into his family. Third, what is the age of the would-be adopter? This should be discovered in order to assess whether he would do better to think of begetting children of his own rather than to be bringing somebody from a stranger's family into his parental power. 3. Furthermore, it has to be considered whether someone with one or more children of his own ought to be refused permission to adopt another, lest it should turn out either that those children whom he begot in lawful wedlock suffer a diminution in expectations of the kind which every child may build up by *obsequium* (dutiful conduct) or that the person adopted obtains less than it will be proper for him to get. 4. On occasion, a poorer person may be permitted to adopt a richer, if the sobriety of his way of life is clearly established and his affection honorable and clearly recognized. 5. But in these cases, the practice is for security to be given.

18 MARCELLUS, *Digest, book 26:* For there is a necessary precondition for acceding to a person's wish to adrogate a pupil-child, even when he has established a good case in other respects, namely this: he must give security to the government slave that he will make over any of the child's property which comes into his hands to those who would have had the right thereto had the child remained in his original status.

19 ULPIAN, *Sabinus, book 26:* No one doubts that these words in the standard form of security which must be given by an adrogator "who have the right to that thing" refer also to grants of liberty made in the secondary testament and *a fortiori* to such a

grant made to a slave who is substitutional heir. Legatees are also covered. 1. If the adrogator should have failed to give security, an *actio utilis* lies against him.

20 MARCELLUS, *Digest, book 26:* The security comes into effect if the *impubes* (child under the age of puberty) in question dies. And although one here speaks of the *pupillus* as a male, the same practice has to be observed in the case of a female.

21 GAIUS, *Rules, sole book:* For females also can be adrogated under imperial rescript.

22 ULPIAN, *Sabinus, book 26:* If the adrogator dies leaving an adoptive son under the age of puberty and if he, in turn, dies soon thereafter still under that age, are the heirs of the adrogator then liable as above? The answer has to be that the heirs also have to make restitution of the property of the child and the quarter in addition. 1. But I am asked if an adrogator can appoint a substitute heir to the child; I think such substitution is not allowed, except perhaps in relation exclusively to the quarter of his goods which the child gets, and only on condition that the substitution take effect earlier than the age of puberty. But if he leaves the property to the child on a *fideicommissum*, on trust to hand over the property at some future date, such a *fideicommissum* ought not to be upheld, because this property has not come to the child by the decision of the deceased, but by the providence of the emperor. 2. All these propositions hold good whether the *adrogatio* of the *pupillus* was as a son or as a grandson.

23 PAUL, *Edict, book 35:* A person given in adoption becomes cognate to everyone to whom he becomes agnate, and not to those to whom he does not become agnate. For adoption confers an agnatic tie, not a blood tie. So if I adopt a boy, my wife is not in the place of mother to him; for he does not become agnatically related to her, and accordingly, she does not become cognate with him either. Likewise, my mother does not have the place of grandmother in relation to him, since he does not become agnate to those who are outside my family. But he whom I adopt does become brother to my daughter, since my daughter is in my family. And, of course, they are also within the prohibited degrees of marriage.

24 ULPIAN, *Disputations, book 1:* A person can be adrogated neither in his absence nor without his consent.

25 ULPIAN, *Opinions, book 5:* After the death of a daughter who had been living as a *mater familias* as if lawfully emancipated and who had appointed testamentary heirs before her death, her father is estopped from initiating proceedings which would give the lie to his own act by raising the allegation that he did not carry out a lawful emancipation or did not do so in the presence of witnesses. 1. No one can either adopt or adrogate in his absence nor accomplish any solemn act of that sort through an agent.

26 JULIAN, *Digest, book 70:* The adoptive son of my emancipated son will not be my grandson.

27 JULIAN, *Digest, book 85:* The offspring of an adoptive son acquires the same position in civil law as if he were himself adopted.

28 GAIUS, *Institutes, book 1:* A man who has in his *potestas* a son and through him a grandson has a free choice as to releasing the son from his power while retaining the grandson or *vice versa* as to keeping the son in power while manumitting the grandson or as to making them both *sui juris*. The same propositions we may take as read in relation to the great-grandson.

29 CALLISTRATUS, *Institutes, book 2:* If a natural father were unable to speak but could by some other means than speech make clear his wish to give his son in adoption, the adoption is thereby validated as if it had been carried out in strict legal form.

30 PAUL, *Rules, book 1:* Even bachelors can adopt sons.

31 MARCIAN, *Rules, book 5:* A son who is in his father's power is unable by any means to compel his father to emancipate him, whether he be a natural or an adoptive son.

32 PAPINIAN, *Questions, book 31:* On occasion, however, a [boy adopted under the age of puberty] is entitled to a hearing if after the age of puberty he should wish to be emancipated; and the matter falls to be determined by a judge after a full examination of the case. 1. The Emperor Titus Antoninus laid down in a rescript that a tutor should be permitted to adopt his own stepson, being tutor to him.

33 MARCIAN, *Rules, book 5:* [The rescript continues:] If he [the stepson] on attaining puberty proves that it is not in his interest to be subjected to the power of the other, fairness demands that he be emancipated and thus recover his former legal position.

34 PAUL, *Questions, book 11:* It has been asked if there is any actionable right in a case where I gave a son to you in adoption subject to the condition that you should give him back to me in adoption after, say, three years. Labeo holds that there is nothing actionable here, since it is not at all agreeable to our customs that someone have a temporary son.

35 PAUL, *Replies, book 1:* A person's rank is not lowered by adoption, but it is raised. Thus, even on adoption by a plebeian a senator remains a senator; and the same goes for the son of a senator.

36 PAUL, *Views, book 18:* It is settled law that a son can be emancipated by his father anywhere at all with valid effect that he leaves his father's power. 1. It has been decided that the act of manumitting a son or of giving one in adoption can be validly executed before a proconsul even in a province not allotted to him.

37 PAUL, *Views, book 2:* One can adopt somebody as a grandson even though one has no son. 1. One cannot adopt for a second time somebody one has previously adopted but subsequently emancipated or given in adoption.

38 MARCELLUS, *Digest, book 26:* A legal defect in an adoption can be cured by imperial confirmation of the adoption.

39 ULPIAN, *Duties of Consul, book 3:* For the deified Marcus issued to Eutychian a rescript in these terms: "Whether you ought to gain what you seek will be determined by the judges after examination of those who contest the matter, that is, those who would be harmed by confirmation of the adoption."

40 MODESTINUS, *Distinctions, book 1:* On the adrogation of a head of household (*pater familias*), those children who were in his power become grandchildren to the adrogator and come into his power at the same moment as does their father. But the same proposition does not apply in a case of adoption; for then the grandchildren are retained in the natural grandfather's power. 1. Not only when someone is adopting but also when he is adrogating, he must be older than the person he is making his son by *adrogatio* or by adoption. What is more, he must be of complete puberty, that is, he must be eighteen years older than the person in question. A eunuch can by *adrogatio* obtain for himself a *suus heres*; his bodily defect is no hindrance to him.

41 MODESTINUS, *Rules, book 2:* If a father emancipates a son through whom he has a grandson-in-power, then afterward adopts that son, the grandson does not revert to his own father's power on the death of the grandfather. Nor does a grandson revert to his own father's power if the grandfather had given the father in adoption while retaining the grandson and subsequently readopted the father.

42 MODESTINUS, *Encyclopaedia, book 1:* We can give in adoption even an infant.

43 POMPONIUS, *Quintus Mucius, book 20:* Adoptions can take place not only of sons

but also of those who take a grandson's place, in the sense that someone is to be deemed our grandson as if he were born to a son, even an indeterminate one.

44 PROCULUS, *Letters, book 8:* Suppose that someone who has a grandson through a son has adopted someone as an adoptive grandson; in that case, I am not of the opinion that there will be legal consanguinity as between the grandsons on the death of the grandfather. But if the adoption took place on the terms that he should be grandson by statutory right, being deemed to have been born of his son Lucius and of the mother of Lucius's family, I hold the opposite opinion.

45 PAUL, *Lex Julia et Papia, book 3:* There are transferred to an adoptive father any legal burdens incumbent on the person given in adoption.

46 ULPIAN, *Lex Julia et Papia, book 4:* A son begotten by me while I was in slavery can be brought into my power by the emperor's grant of a benefit. That he remains of freedman status is however not open to doubt.

8

"THINGS" SUBDIVIDED AND QUALITATIVELY ANALYZED

1 GAIUS, *Institutes, book 2:* The main division of things distinguishes them under two heads: some things are subject to divine right, others to human. Those subject to divine right are, for example, sacred things and religious things. Sanctified things (*res sanctae*) also, such as city walls and portals, are in a certain degree subject to divine right. For what is subject to divine right is not anyone's property. But something which is subject to human right does in most cases belong within someone's property, though it can happen that it is not so. For things comprising a deceased person's estate are not in anyone's ownership until someone becomes heir. Those things which are subject to human right are either public or private. Public things are considered to be nobody's property for they belong corporately to the whole community. Private things are things which belong to individuals. 1. Further, some things are corporeal, others incorporeal. Corporeal things are those which can be touched, such as land, a slave, a garment, gold, silver, and in short innumerable other things. Incorporeal things are things which cannot be touched, being of the sort which exist only in contemplation of law, such as the estate of a deceased person, a usufruct, and obligations however taken on. Nor is it relevant that in an estate are contained corporeal things. For the fruits which are gathered from a piece of land are also corporeal, and what we are owed under some obligation or other is most commonly corporeal, for example, land, a slave, money. The fact is that the right of succession itself, the right to use and to fruits itself, and the right itself correlative to the obligation is in each case incorporeal. Among this number also are the rights attaching to landholdings both urban and rural which bear the name also of servitudes.

2 MARCIAN, *Institutes, book 3:* Some things belong in common to all men by *jus naturale*, some to a community corporately, some to no one, but most belong to individuals severally, being ascribed to someone on one of various grounds. 1. And indeed by natural law the following belong in common to all men: air, flowing water, and the sea, and therewith the shores of the sea.

3 FLORENTINUS, *Institutes, book 6:* Likewise, pebbles, gems, and so on which we find on the shore forthwith become ours by natural law.

4 MARCIAN, *Institutes, book 3:* No one, therefore, is prohibited from going on to the

seashore to fish, provided he keeps clear of houses, buildings, or monuments, since these are not, as the sea certainly is, subject to the *jus gentium.* So it was laid down by the deified Pius in a rescript to the fishermen of Formiae and Capena. But almost all rivers and harbors are public property.

5 GAIUS, *Everyday Matters or Golden Words, book 2:* The right to use river banks is public by *jus gentium* just as is the use of the river itself. And everyone is at liberty to run boats aground on them, to tie ropes on to trees rooted there, to dry nets and haul them up from the sea, and to place any cargo on them, just as to sail up or down the river itself. But ownership of the banks is in those to whose estates they connect. Accordingly, trees growing in them belong to those same proprietors. 1. Those who fish in the sea are at liberty to erect a hut on the shore in which to take shelter.

6 MARCIAN, *Institutes, book 3:* This principle is taken as far as to the conclusion that people who build there are constituted owners of the ground, but only as long as the building remains there. Conversely, when the building collapses then, as if by right of *postliminium,* the place reverts to its former condition, and if someone builds in that same place, it becomes his. 1. Things in *civitates* such as theaters and stadiums and such like, and anything else which belongs communally to the *civitates* are property of the community corporately not of separate individuals. Thus, even the communal slave of the *civitas* is considered to belong not to individuals in undivided shares but to the community corporately, and accordingly, the deified brothers ruled in a rescript that a slave belonging to the *civitas* can be put to the torture as readily to inculpate as to exculpate a citizen. So too does a freedman of the *civitas* not have to seek special relaxation of the edict, if he should summon one of the citizens before the praetor (*in jus vocatio*). 2. Things sacred or religious or sanctified are no one's property. 3. Things sacred are then those which have been consecrated by an act of the whole people, not by anyone in his private capacity. Therefore, if someone makes a thing sacred for himself, acting in a private capacity, the thing is not sacred but profane. When a temple has once been consecrated, then even on destruction of the building the site remains sacred. 4. Being religious is, however, a quality which every single person can impose on a site of his own free will by burying a corpse in a place which one owns. When a sepulcher is held in common ownership, one co-owner may bury a corpse even against the will of the others. It is lawful to inter a body in someone else's land with the owner's permission, and even though he give approval after the interment of the corpse, the place becomes religious. The better view is that a Cenotaph also is a religious place, Virgil being a witness to this point.

7 ULPIAN, *Edict, book 25:* But the deified brothers issued a rescript to the contrary on this point.

8 MARCIAN, *Rules, book 4:* Whatever has been defended and secured against human mischief is sanctified (*sanctum*). 1. This term (*sanctum*) derives from the word *sagmina. Sagmina* are certain herbs which legates of the people of Rome customarily carry to ward off outrages, just as ambassadors of the Greeks carry the things which are called *cerycia.* 2. Cassius reports that Sabinus gave the correct opinion that in the case of municipalities also [as well as the city of Rome] the walls are sanctified and that there ought to be a prohibition on building onto them.

9 ULPIAN, *Edict, book 68:* Sacred places are those which are dedicated publicly

whether within the *civitas* or in the countryside. 1. It must be understood that a public place only becomes a sacred one when the emperor has dedicated it or has granted a power of dedicating it. 2. A noteworthy point is that a sacred place is one thing, but a *sacrarium* is quite another. A sacred place is one which has been consecrated; a *sacrarium* is a place in which sacred things are laid up, as can be the case even in a private building, and those who wish to free such a place from its religious tie do so customarily by evocation of the sacred things therefrom. 3. Properly speaking, we use the term "sanctified" (*sancta*) of objects which are neither sacred nor profane but which are confirmed by some kind of sanction. Thus, laws are sanctified; for they are supported by a kind of sanction. Anything which is supported by some kind of sanction is sanctified, even though it be not consecrated to a god. Sometimes in sanctifying provisions it is added that anyone who commits some offense in the sanctified place shall be liable to capital punishment. 4. It is unlawful to rebuild the walls of municipalities without authorization by the emperor or the governor, nor to build anything onto or on top of them. 5. A sacred thing is not subject to pecuniary valuation.

10 POMPONIUS, *From Plautius, book 6:* Aristo says that just as a building erected in the sea becomes private property, so too one which has been overrun by the sea becomes public.

11 POMPONIUS, *Readings, book 2:* It is an offense punishable with capital punishment to violate city walls, for example, by moving up ladders and climbing over or by any other means. It is unlawful for Roman citizens to use any other egress than the portals; for to do so is a hostile act and an abomination. Indeed, the tradition is that Romulus's brother Remus was slain on the very ground that he tried to climb out over the city wall.

9

SENATORS

1 ULPIAN, *Edict, book 62:* That a man of consular rank always takes precedence over a lady of consular rank is a point no one doubts. But whether a man of prefectorial rank takes precedence over a lady of consular rank remains to be seen. I should think he does, because greater dignity inheres in the male sex. 1. "Consular," of course, is a term we apply to ladies married to men who have been consuls. Saturninus adds also their mothers, but no case of this is reported from anywhere, nor has this ever been the received practice.

2 MARCELLUS, *Digest, book 3:* Cassius Longinus is not of opinion that it is permissible for someone who has been removed from and not yet restored to the senate on account of grave misconduct to act as judge or to bear witness, this being forbidden by the Julian enactment on extortion (the *lex Julia repetundarum*).

3 MODESTINUS, *Rules, book 6:* The deified Severus and Antoninus gave permission whereby a senator who had been removed from the senate need not suffer *capitis deminutio* but might stay in Rome.

4 POMPONIUS, *Readings, book 12:* He who is unworthy of an inferior rank is all the more unworthy of a superior one.

5 ULPIAN, *Lex Julia et Papia, book 1:* We must understand as being "a senator's son" not only one who is naturally so but also an adoptive son. Neither will it make any difference from whom or by which process he was adopted nor does it make any difference whether the senator adopted him when already confirmed in senatorial rank or did so before attaining it.

6 PAUL, *Lex Julia et Papia, book 2:* "Senator's son" includes someone whom the senator has taken in adoption, so long as he remains within his family. But on being emancipated he thereby forfeits the description son. 1. When a son is given in adoption by a senator to a person who is of inferior rank, the son is regarded as being the son of a

senator, because senatorial rank is not lost by adoption into an inferior rank—no more than one would cease to be of consular standing in such a case.

7 ULPIAN, *Lex Julia et Papia, book 1:* It is settled that a son emancipated by his father, a senator, is treated as if he were a senator's son. 1. Likewise, Labeo writes that the posthumous son whose father was a senator is deemed a senator's son. But if someone is conceived and born after his father has been demoted from the senate, Proculus and Pegasus opine that he is not to be deemed a senator's son, and their opinion is correct. For indeed you cannot properly call someone a senator's son when his father was demoted from the senate before he was born. Yet if someone were conceived before his father's demotion from the senate and were born after his father's loss of rank, there is more of a ground for his being deemed a senator's son. For there are many decisions to the effect that the time of conception is what ought to be kept in view. 2. If a man has a senator both as father and as grandfather, he is considered as being both a senator's son and a senator's grandson. But if his father lost that rank before his conception, it may be asked whether, although not deemed a senator's son, he ought nevertheless to be considered the grandson of a senator. The better view is that he ought to be, so that his grandfather's dignity may advance him rather than his father's fall from grace be an obstacle to him.

8 ULPIAN, *Fideicommissa, book 6:* The description "most honorable persons" includes women married to persons who are most honorable. But the term "most honorable women" does not cover the daughters of senators except if they have come by husbands who are most honorable. Husbands confer on their wives the dignity of being most honorable, but parents do so only until such time as they have formed a marital union with a plebeian. Thus, a woman will be a most honorable so long as she is married to a senator or a most honorable or is separated from him but has not married anyone else of inferior rank.

9 PAPINIAN, *Replies, book 4:* The fall of a father does not make a senator's daughter who has gone through a marriage ceremony with a freedman his wife. The rank attained by children is not taken away by their father's fall when he is demoted from the senate.

10 ULPIAN, *Edict, book 34:* We must understand as being senators' children not only sons of senators but all such as are said to be offspring of them or of their children, whether those who are considered their parents are natural or adoptive children of senators. But if someone was born of a senator's daughter, we have to look into his father's standing.

11 PAUL, *Edict, book 41:* Although senators are deemed to have their domicile in the city, nevertheless, they are also considered as having a domicile in the place from which they originated. For their rank is seen to have given them rather than additional domicile than a change of domicile.

12 ULPIAN, *Census, book 2:* Women who previously have been married to a man of consular rank generally try to prevail on the emperor to let them, albeit very exceptionally, keep their consular rank despite a subsequent marriage to a man of lower rank. One case of which I know: the Emperor Antoninus gave this indulgence to his cousin Julia Mamaea. 1. By senators we should understand people whose descent from patricians and consuls stretches back to illustrious men, because these and only these men are entitled to deliver speeches in the senate.

10

DUTIES OF CONSUL

1 ULPIAN, *Duties of Consul, book 2:* It is a duty of the consul to offer counsel to those who wish to execute a manumission. 1. Consuls acting by themselves singly also carry out manumissions, but one cannot have names listed before one consul and

then execute the manumission before the other. For manumissions are separate acts in law. Certainly, if in any case one consul cannot carry out a manumission, being prevented by infirmity or some other legitimate ground, then according to a ruling of the senate his colleague can give clearance to the manumission. 2. There is absolutely no doubt that consuls can manumit their own slaves in their own courts. But if a consul happens to be less than twenty years of age, he cannot manumit in his own court, since he is himself the person who under the *senatus consultum* carries out the examination with a view to counseling [on the manumission]. He can however manumit in his colleagues' court if he proves the case [for manumission].

11

DUTIES OF PREFECT OF THE PRAETORIAN GUARD

1 AURELIUS ARCADIUS CHARISIUS, *Master of the Rolls, Duties of Praetorian Prefect, sole book:* It is necessary to give a brief reminder of the process whereby it originally emerged that the office of praetorian prefect was set up. According to tradition, attested by certain writers, the prefects of the praetorian guard were anciently appointed in place of masters of the horse (*magistri equitum*). For whereas in the times of our ancestors supreme power was temporarily entrusted to dictators, and they chose masters of the horse who wielded power in the second degree after the dictator as associates sharing in their burdens for military purposes; so too when governance of the commonwealth was transferred to permanent emperors, they chose prefects of the praetorian guard, on the analogy of the masters of the horse. A fuller range of authority was given to them with a view to procuring improvement in public discipline. 1. The powers of the prefects, which started from these swaddling clothes, have deservedly expanded so greatly that there is no possibility of appeal from the prefects of the praetorian guard. For although it was previously a question whether it was permissible to appeal from the prefects, and although this was permissible *de jure* and there did exist some precedents of people who had appealed, yet subsequently the right of appeal was rescinded by an imperial decision read out in public. For the emperor declared his faith that those men, who were brought to the greatness of this office on account of their exceptional industriousness after thorough testing of their fidelity and seriousness, would judge no differently on behalf of the wisdom and the beacon of his own exalted rank than he would have judged himself. 2. The praetorian prefects have been endowed with a further privilege, whereby there can be no *restitutio in integrum* upsetting their sentences in favor of those under the age of majority, save by the praetorian prefects themselves.

12

DUTIES OF PREFECT OF THE CITY

1 ULPIAN, *Duties of Prefect of the City, sole book:* All criminal matters whatsoever have been successfully claimed by the prefecture of the city as its own domain, and not only the crimes which are committed within the city but also those which have been committed outside the city but anywhere in Italy. So it is declared in a letter sent by the deified Severus to Fabius Cilo, prefect of the city. 1. He is to give a hearing to slaves who have taken refuge by the statue or who have paid with their own money for their manumission, when they make complaints against their masters. 2. But also when needy former masters (*patroni*) are raising complaints about the conduct of their freedman, he is to grant a hearing, especially if they claim to be ill and request the support of their freedmen. 3. They have power of relegation and of deportation to any island designated by the emperor. 4. In the opening passage of that same

letter, the following is written: "Since we have entrusted our city to you by way of *fideicommissum*," therefore whatever crime is committed within the city evidently belongs to the jurisdiction of the prefect of the city. Besides this, any crime committed within the hundredth milestone belongs to his jurisdiction, but anything an inch beyond the milestone falls outside his scrutiny. 5. A man must have a hearing before the prefect if he would allege that his slave has committed adultery upon his wife. 6. He also has power to hear cases under the interdict *quod vi aut clam* or the interdict *unde vi*. 7. Another type of case commonly remitted to the prefecture is that of tutors or curators who, having committed malversations in their tutorship or curatory, deserve more severe punishment than would be sufficiently provided by the *infamia* consequent on *de suspecto* proceedings. Such are the cases of people against whom it can be proven that they grabbed a tutorship by paying money for it or that in return for a bribe they took pains to secure that someone was given an unsuitable tutor or that they understated the amount of the ward's estate in consultation over disclosure of its contents or that they alienated property of the ward in a plainly fraudulent way. 8. The statement that the prefect is supposed to give a hearing to slaves making complaints against their masters is one we should accept in this sense: not as to slaves making an accusation against masters (for this is in no way permissible for a slave to do save in specified cases), but in the event that they should make a truthful expostulation and if they were to show in the prefect's court a case of savagery or of harshness or of starvation whereby their masters were oppressing them, or a case of obscenity in performance of which the masters had exercised or were exercising compulsion. This duty was given to the prefect by the deified Severus, the duty of protecting human chattels from prostitution. 9. Further, it is a duty of the prefect to insure that moneylenders deal honestly in all their business and observe relevant prohibitions. 10. When a patron alleges that his freedman has committed an act of contempt toward him or complains that his freedman is contemptuous in attitude or avers that he or his wife or children have suffered outrageous insult at the freedman's hands or anything of this sort, an approach is normally made to the prefect of the city, and his practice is to subject the freedman to correction according to the seriousness of the complaint, whether issuing a reprimand or ordering a flogging or going further in the way of punishment. For, indeed, freedmen often have to be punished. To be sure, if a patron can show that a charge was laid against him by his freedman or a conspiracy got up with his enemies, the punishment of being sent to the metal mines ought to be imposed on the freedman. 11. Supervision of the whole meat trade to secure that meat is on offer at just prices is another matter in the care of the prefecture, and thus the pig market is also under the prefect's supervision. Indeed, dealings in other cattle and herd animals, so far as they bear upon consumer offers of this kind, belong under his supervision. 12. Keeping the peace among the citizens and maintaining order at public spectacles are also held to belong to the prefect's supervisory function. Indeed, his duty is to keep military guardsmen stationed at various places to preserve the peace of members of the public and keep him informed what is going on and where. 13. The prefect of the city has power to ban people from both the city and any other regular districts, from trading, from professions, from advocacy, and from the law courts, for a time and in perpetuity. This power includes banning from public spectacles, and in the event of banishing someone from Italy he has power also to remove him from his own province. The deified Severus laid down in a rescript that persons alleged to have formed an unlawful association are also to be accused before the prefect of the city.

2 PAUL, *Duties of Prefect of the City, sole book:* Applications to him can also be made by or against bankers and in money cases generally, under a letter of the deified Hadrian.

3 ULPIAN, *Edict, book 2:* When the prefect of the city has crossed the boundary of the city, he has no official power, but he can appoint a judge outside the city.

13

DUTIES OF QUAESTOR

1 ULPIAN, *Duties of Quaestor, sole book:* The original occasion for establishing the quaestors was long long ago and almost earlier than all the other magistracies. Indeed, Gracchanus Junius reports in the seventh of his books on magisterial powers that Romulus himself and Numa Pompilius had each two quaestors whom they appointed not on their own say-so, but by popular election. But much as it may be doubted whether there was a quaestor during the reigns of Romulus and Numa, it is quite certain that there were quaestors when Tullus Hostilius was king. Quite the more widely held opinion among the ancients is that Tullus Hostilius was the first to bring quaestors into government. 1. That from the beginning they were called quaestors from the kind of inquests they conduct is stated in the writings of Junius and of Trebatius and of Fenestella. 2. The custom used to be for some of the quaestors to be allocated their provinces by lot, under a *senatus consultum* which was passed during the consulship of Decimus Drusus and Porcina, but clearly not all the quaestors drew lots for their provinces; for the emperor's candidates were excepted. They, in fact, fulfill their function solely in reading out imperial writings in the senate. 3. At the present time, the rule has come to be that both patricians and plebeians indifferently can be appointed quaestors; for this office amounts to the first step on the ladder of holding political office and of taking part in senate debates. 4. Of the quaestors, as we have said, some are the ones who used to be called emperor's candidates and who read out his letters in the senate.

14

DUTIES OF PRAETORS

1 ULPIAN, *Sabinus, book 26:* When the praetor is a son-in-power, his father can perform manumissions in his court despite that fact.

2 PAUL, *Sabinus, book 4:* Indeed, it is settled law that he himself can be emancipated or given in adoption in his own court.

3 ULPIAN, *Sabinus, book 38:* Barbarius Philippus, while he was a runaway slave, stood as a candidate for the praetorship at home and became praetor designate. His servile status was no kind of obstacle, says Pomponius, to his being praetor; as a matter of fact he did perform the functions of the praetorship. But let us consider: if a slave, so long as his status was unknown, exercised the praetorian responsibilities, what are we to say? That the edicts and decrees he issued would be null and void? Would that be to the benefit of those who had sued in his court either on statutory grounds or by some other right? The truth, I think, is that none of these edicts, decrees, and so forth, would be deemed nullities. For this is the more humane view. For the Roman people certainly was competent to have conferred this power on a slave, but, of course, if it had known he was a slave, it would have set him free. The right to do so then must all the more be held valid in the case of the emperor.

4 ULPIAN, *All Seats of Judgment, book 1:* The praetor has no power either to appoint himself as a tutor or to appoint himself a special judge.

15

DUTIES OF PREFECT OF THE CITY GUARD

1 PAUL, *Duties of Prefect of the City Guard, sole book:* In the times of our ancestors, a triumvirate had charge of guarding against fires. They were called nightmen on account of the fact that they worked while others slept. On occasion, aediles and tribunes of the *plebs* took a hand in this work. There was, however, a team of government slaves stationed around the portals and city walls, whence they could be called out at need. There had also been privately maintained teams for putting out fires either for payment or gratis. In the end, the deified Augustus preferred to take the care of this matter into his own hands

2 ULPIAN, *Duties of Prefect of the City Guard, sole book:* because several fires had broken out on one day.

3 PAUL, *Duties of Prefect of the City Guard, sole book:* For he believed that it fitted no one more than Caesar to watch over the safety of the commonwealth, and that no one else was up to the job. Accordingly, he established seven cohorts at suitable places, on the principle that each single cohort watched over two districts, there being a tribune in charge of each cohort, and over them all a man of the *spectabile* class, called the prefect of the city guard. 1. The prefect of the city guard tries cases of arsonists, burglars, thieves, robbers, and resetters except if it happens that the offender is so vicious and notorious that his case is remitted to the prefect of the city. Because very often houses go on fire through the negligence of the occupiers, he either chastises by beating those who have kept their fire too carelessly, or he gives them a severe dressing down and warning then lets them off the beating. 2. Housebreakings happen mostly in tenement blocks or in the warehouses where people store the most precious part of their fortunes; a store-chamber or a cupboard or a chest gets broken into. The custodians are very often punishable, just as indeed the deified Antoninus stated in a rescript to Erucius Clarus. For he said that Erucius could, when warehouses were burgled, hold an inquest concerning the slaves who were on guard, even though the emperor himself should have a part share in them. 3. It should be realized that the prefect of the city guard is obliged to keep watch throughout the whole night and to keep on the prowl accompanied and properly shod. 4. And equipped with hooks and axes, and he is obliged to admonish all occupiers not to let fires break out through some carelessness. Moreover, he is under orders to warn everyone to have a supply of water ready in an upstairs room. 5. As against the *capsarii* also, who engage for hire to look after people's clothes at the baths, he has been set up as a judge with authority himself to hold a hearing if they should have dealt fraudulently in looking after the clothes.

4 ULPIAN, *Duties of Prefect of the City, sole book:* The Emperors Severus and Antoninus issued rescripts to Junius Rufinus, prefect of the city guard, in the following terms: "You can also order to be beaten with sticks or flogged those flat-dwellers who have kept their house-fires carelessly. But those who are convicted of willful and malicious arson, you shall remit to our friend Fabius Cilo, prefect of the city. You ought to hunt down fugitive slaves and return them to their masters."

16

DUTIES OF PROCONSUL AND OF LEGATE

1 ULPIAN, *Disputations, book 1:* A proconsul holds his proconsular insignia wherever he is from the moment he leaves the city. But he only exercises power in that one province which has been assigned to him.

2 MARCIAN, *Institutes, book 1:* All proconsuls have jurisdiction from the very moment they leave the city, but not in contentious matters, only in consensual ones; for example, children and slaves can be manumitted before them, and adoptions effected. 1. Before the proconsul's legate, however, no one can execute a manumission, since he has no such jurisdiction.

3 ULPIAN, *Sabinus, book 26:* Nor can one effect an adoption before him; for certainly he cannot preside over a statutory action-at-law (*legis actio*).

4 ULPIAN, *Duties of Proconsul, book 1:* The proconsul has to watch that he does not overburden the province through too lavish hospitality; so warned our present emperor and his father in a rescript to Aufidius Severianus. 1. None of the proconsuls may have grooms of his own; instead of these, soldiers perform that service in the provinces. 2. While it is indeed better that a proconsul go out to his province without his wife, he can also do so with her, provided he is aware that during the consulship of Cotta and Messala the senate decided that for the future if any delinquency were committed by the wives of those who had gone off to take up office, they themselves would be held to account for it and to make satisfaction therefor. 3. The proconsul, before crossing the bounds into the province assigned to him, ought to send on an edict anent his own arrival; this should contain some commendation of himself, such as perhaps that he is on friendly terms with citizens of the province or is related to them, and, most important, it should excuse the inhabitants from coming to meet him either publicly or privately, on the ground that it is right and proper for everyone to receive him in their own country. 4. He will be doing the right and mannerly thing if he sends the edict to his predecessor and gives him notice on which day he will arrive over the boundary. For uncertainties and unexpected events are especially upsetting to provincials, and they interfere with business. 5. He must observe this point in making his entry, that he enters by that part of the province where such entries are customarily made, and that he pays attention to what the Greeks call *epidemiae* (stopping-off places) or *kataplous* (port of entry), whatever be the *civitas* to which he first comes or at which he first lands. The provincials set a high value on fidelity to that custom and to prerogatives of this kind. Some provinces even have it that the proconsul should come by sea. For example, the province of Asia, indeed carries it to this length that the present Emperor Antoninus Augustus on the entreaties of the Asians gave out a rescript imposing a requirement on the proconsul that he proceed to Asia by sea and that he land at Ephesus first of all the metropolitan centers. 6. After all these things, once he has entered the province, he ought to delegate his jurisdictional functions to his legate; but this he ought not to do before his entry into the province. For it is utterly absurd that someone should delegate to another what he does not have, delegating jurisdiction before taking it up himself (for the proconsul has no jurisdictional competence before he enters his province). But if someone should do so before entry, and should then remain of the same mind once he has entered, it must be held that the legate seems to have jurisdiction, not from that moment at which it was delegated to him, but from the moment of the proconsul's entry into the province.

5 PAPINIAN, *Questions, book 1:* It is sometimes possible for a proconsul to delegate jurisdictional functions, even though he has not yet arrived in the province. A case might be if he were to suffer some unavoidable delay on his journey, but the legate were to arrive right up to time in the province.

6 ULPIAN, *Duties of Proconsul, book 1:* Proconsuls commonly delegate to their legates the examination of prisoners also, that is, on the principle that they remit cases to the proconsul after a preliminary hearing of the prisoners, freeing by themselves those who are innocent. But this type of delegation is irregular; for no one indeed can transfer to another a power of the sword or of coercing other people granted to himself, nor therefore is the right to acquit accused persons transferable to someone before whom the accusation could not validly be laid. 1. As the proconsul has a free discretion to delegate or not to delegate jurisdictional functions, so by the same token the proconsul is entitled to terminate a mandate to exercise these functions, but

he ought not to do so without first consulting the emperor. 2. Legates ought not to consult the emperor, but their own proconsul, and it is his job to reply to the points of consultation put by his legates. 3. A proconsul is not absolutely obliged to decline gifts, but he should aim for a mean, neither sulkily holding completely back nor greedily going beyond a reasonable level for gifts. On this subject, the Deified Severus and the present Emperor Antoninus have most delicately given guidelines in a letter, whose words are as follows: "So far as concerns presents, attend to what we say: there is an old proverb 'neither everything nor every time nor from every person.' For certainly, it is unmannerly to accept from no one, but to take from everyone is utterly contemptible and to take everything offered is sheer greed." The provision contained in warrants of appointment that a proconsul or someone in another such office himself neither accept any gift or commission nor purchase anything save provisions as needed day by day, refers not to token presents, but to such things as go beyond the norm of hospitality. But neither may little presents be piled up to achieve the quality of substantial payments.

7 ULPIAN, *Duties of Proconsul, book 2:* If a proconsul arrives in some populous *civitas* or in the capital of the province, he ought without ill-grace to put up with hearing a commendation of the *civitas* and the singing of his own praises, since the provincial people hold that as a point of honor. He should also grant holidays according to the local customs and the practice which has previously obtained. 1. He should go on a tour of inspection of sacred buildings and public works to check whether they are sound in walls and roofs or are in need of any rebuilding. He should see to it that whatever works have been started, they are finished as fully as the resources of that municipality permit, he should with full formality appoint attentive people as overseers of the works, and he should also in case of need provide military attachés for the assistance of the overseers. Since a proconsul has the most complete judicial authority, there belong to him in person the powers of all those who exercise jurisdiction at Rome whether as magistrates or on an extraordinary commission.

8 ULPIAN, *Edict, book 39:* So that he has in the province authority greater than everyone else after the emperor.

9 ULPIAN, *Duties of Proconsul, book 1:* And there is in a province nothing which may not be admitted to process by his order. Of course, if there should be a case of a pecuniary kind involving a fiscal interest which is the concern of the emperor's procurator, he would do better to leave well alone. 1. Where a decree is required, it will not be valid for the proconsul to dispose of the matter by a writ; for all things whatsoever which require judicial hearing of a case are incapable of being disposed of by writ. 2. It behooves a proconsul to be patient with advocates, but to do so shrewdly, so as not to seem contemptuous; nor should he disguise his feelings on the point if he should detect people who are committing maintenance or champerty, and he should only allow to address the court those to whom his edict gives the right of audience. 3. Matters which a proconsul can dispose of *de plano* (out of court) are these: the issuance of orders for proper respect to be shown to parents, to patrons, and to the children of patrons; deterrent warnings can be validly issued *de plano* to a son whose father has laid an information against him to the effect that his conduct has not been as it ought to have been; and the same goes for correction of a disrespectful freedman, whether verbally or by chastisement with rods. 4. Accordingly, he is duty bound to watch that he has some system of ranking applications, and in fact to make sure that everyone's request gets a hearing and that it does not turn out that while the high rank of some applicants gets its due and unscrupulousness gets concessions middling people do not put their requests, either having quite failed to find advocates or having instructed less well-known ones, whose position is not one of any standing. 5. It will also be his duty in most cases to allow the use of counsel by petitioners who are: women, *pupilli*, those otherwise under a disability, or those who are out of their minds, if anyone seeks this for them. Even if there be no one to seek it, he ought to

give them it anyway. But if someone should represent himself as being unable to find an advocate because of his opponent's power, it is just as much incumbent on the proconsul to give him one. But it is wrong for anyone to be oppressed by the sheer power of his opponent; in fact, it tends to harm the reputation of the person who has charge of the province, if someone gets away with such overpowering behavior that everyone is afraid to take instructions as an advocate against him. 6. The foregoing remarks apply in common to all colonial governors and should be taken to heart by them too.

10 ULPIAN, *Duties of Proconsul, book 10:* Appointees will do well to remember that a proconsul is duty bound to carry on all the business of government right up to the moment of his successor's arrival, for the proconsulship is unitary and the well being of the province demands that there be someone through whose authority the provincials may transact their business. And so one is obliged to go on administering justice until the arrival of one's successor. 1. In the *lex Julia* on extortion and in the rescript of the deified Hadrian to Calpurnius Rufus proconsul of Achaea, there is an admonition to a proconsul not to let his legate leave the province before himself.

11 VENULEIUS SATURNINUS, *Duties of Proconsul, book 2:* If a matter should arise which calls for one of the heavier punishments, the legate must refer it to the proconsul's court. For he has no right to apply the death sentence or a sentence of imprisonment or of severe flogging.

12 PAUL, *Edict, book 2:* A legate to whom jurisdictional functions have been entrusted has the right to appoint a judge.

13 POMPONIUS, *Quintus Mucius, book 10:* Proconsular legates do not have any jurisdiction as of right, but only such as may be given by express mandate of the proconsul.

14 ULPIAN, *Lex Julia et Papia, book 20:* Proconsuls are attended by no more than six *fasces.*

15 LICINNIUS RUFINUS, *Rules, book 3:* Proconsular legates also can grant tutors.

16 ULPIAN, *Edict, book 2:* A proconsul lays down his command on entering the gate of Rome.

17

DUTIES OF PREFECT OF EGYPT

1 ULPIAN, *Edict, book 15:* The prefect of Egypt does not lay down his prefectorship and the command which during Augustus's reign was given to him by statute on the model of the proconsulship, until his successor enters Alexandria, even if he has entered the province earlier; this is stated in his warrant of appointment.

18

DUTIES OF GOVERNOR

1 MACER, *Duties of Governor, book 1:* Governor (*praeses*) is a general term, and so proconsuls and imperial legates and all people who govern provinces, although they may be senators, are called governors. Proconsul is a special title.

2 ULPIAN, *Sabinus, book 26:* A governor can effect an adoption in his own court, just as he can emancipate a son or a slave.

3 PAUL, *Sabinus, book 13:* The governor of a province has authority only over the people of his own province, and that only while he is in the province. For the moment he leaves it, he is a private citizen. Sometimes he has power even in relation to nonresidents, if they have taken direct part in criminal activity. For it is to be found in the

imperial warrants of appointment that he who has charge of the province shall attend to cleansing the province of evil men; and no distinction is drawn as to where they may come from.

4 ULPIAN, *Edict, book 39:* The governor of a province has in the province authority greater than everyone else after the emperor.

5 ULPIAN, *All Seats of Judgment, book 1:* The governor of a province cannot in his own right appoint himself as a tutor any more than he can make himself a special judge.

6 ULPIAN, *Opinions, book 1:* Let the governor of a province forbid illicit exactions and forcible exactions and sales or guarantees extorted through fear, perhaps without payment of any price at all. Let the governor also see to it that no one shall be the victim of crooked gains or losses. 1. That government has been conducted on the basis of erroneous information is not a bar to establishing the truth. Accordingly, the provincial governor must pursue the course which it is appropriate for him to take, having faith in whatever facts will be proven. 2. The provincial governor should be religiously zealous in preventing more influential people from inflicting wrongs on those of lower station and in seeing that those who defend the latter are not framed up on charges of infamous crime when they are innocent. 3. The provincial governor must see to preventing and, in case of detection, to putting down illicit services which are forthcoming on the pretext of giving help to the armed forces while actually aimed at alarming the public, and he must prohibit unlawful exactions being made in the guise of levying tribute. 4. The provincial governor must make it a matter of especial concern that no one be prevented from carrying on any lawful business, that no one carry on prohibited activities and that no innocent persons have penalties imposed on them. 5. The provincial governor shall make provision so that men of small means do not suffer the injustices of having their single lamp or their scanty furniture taken from them for others' use on the pretext of quartering newly arrived officials or soldiers. 6. The provincial governor must see to it that things are not commandeered in the name of the military which do not actually serve the common needs of the soldiery, but which some of them are crookedly claiming to their own advantage. 7. Just as, on the one hand, a doctor is not to be held at fault merely on the occurrence of death, yet, on the other, an unskillfully executed operation is imputable to him; so too the wrong done by someone who resorts to deceit of others when in danger ought not to be held blameless on the pretext of human frailty. 8. Those who rule entire provinces have full power of the sword (*jus gladii*), and they are also permitted to send people to the metal mines. 9. If a provincial governor discovers that a fine which he has imposed cannot be paid out of the present means of those whom he so sentenced, there should be some relaxation in the requirement to pay, and a reining in of the improper zeal of the fine collectors. A fine remitted on account of poverty by those who govern provinces ought not to be exacted.

7 ULPIAN, *Opinions, book 3:* A provincial governor ought to compel owners to repair buildings, sufficient ground having been shown on inspection of them. If they refuse, he should by the use of some competent remedy against them patch up the unsightly appearance of the buildings.

8 JULIAN, *Digest, book 1:* I have often heard our present emperor saying that a rescript, which states, "you may approach the officer who presides over the province," does not impose on the proconsul or legate or provincial governor the duty of personally undertaking the judicial examination. But he ought to weigh up whether to hear the case himself or to appoint a judge for that purpose.

9 CALLISTRATUS, *Judicial Examination, book 1:* In general, whenever the emperor remits matters back to provincial governors by rescripts such as "you may approach the officer who presides over the province" or the same with this addition: "he shall consider what steps he should take," a requirement of personally undertaking the judicial hearing is not imposed on the proconsul or legate. But even though "he

shall consider what steps he should take" be not added, he ought to consider whether he should hear the case himself or ought to appoint a judge.

10 HERMOGENIAN, *Epitome of Law, book 2:* To co-rulers and provincial governors belongs consideration of all the cases which in Rome are heard by the prefect of the city or the praetorian prefect or likewise consuls, praetors, and the rest of them.

11 MARCIAN, *Institutes, book 3:* All the various applications which in Rome have various different judges belong in the provinces to the governor's office.

12 PROCULUS, *Letters, book 4:* But although the officer who presides over a province has to take the place and fulfill the jobs of all the magistrates at Rome, nevertheless, attention must not be paid to what is done at Rome rather than to what ought to be done.

13 ULPIAN, *Duties of Proconsul, book 7:* It befits a good and responsible governor to see that the province he rules is peaceful and orderly. This he will achieve without difficulty, if he works conscientiously at ridding the province of wicked men and at seeking them out to that end. For he is duty-bound to search out blasphemers, robbers, hijackers, and thieves and to punish them each according to the evil he has done and to jail those who harbor them without whose help a robber cannot lie hidden for too long. 1. In the case of madmen whom their relatives cannot keep under control, there is a remedy to which the governor must resort, namely, that of confining them in prison. So held the deified Pius in a rescript. Certainly, it should be a matter of inquiry, according to the opinion of the deified brothers, in the case of a person who had committed parricide, whether he committed the crime in a fit of pretended madness or whether he was really and truly not *compos mentis*. The aim is that he be punished if he was pretending, but that he be confined in prison if he was really insane.

14 MACER, *Criminal Trials, book 2:* The deified Marcus and Commodus issued a rescript to Scapula Tertullus in the following terms: "If you have clearly ascertained that Aelius Priscus is in such a state of insanity that he lacks all understanding through the continuous alienation of his mental faculties, and if there remains no suspicion that his mother was murdered by him under pretence of madness; then you can abandon consideration of the measure of his punishment, since he is being punished enough by his very madness. And yet it will be necessary for him to be all too closely guarded, and, if you think it advisable, even bound in chains, this being a matter of not so much punishing as protecting him and of the safety of his neighbors. If, however, as very often happens, he has intermittent periods of relative sanity, you shall diligently explore the question whether in one such moment he committed the crime, and whether no indulgence is due to his illness. If you ascertain any such thing, you shall consult us, that we may consider whether the enormity of his crime (in the event of his having committed it when he could be held to have been fully aware) merits the infliction of extreme punishment.

"But since we have learned from your letter that his position and rank are such that he is in the custody of his own people or even in his own house, it seems to us that you will act rightly if you summon those by whom at the material time he was being looked after, and if you make inquiry into the cause of so neglectful an act, and if you make a decision against each one of them according as you find his culpability lesser or greater.

"For those who have custody of the insane are not responsible only for seeing that they do not do themselves too much harm but also for seeing that they do not bring destruction on others. But if that should happen, it may deservedly be imputed to the fault of those who were too neglectful in performing their duties."

15 MARCIAN, *Criminal Trials, book 1:* It is a point worth attending to, that he who

governs a province may not cross its boundaries unless to discharge a vow; and even then, he may not absent himself overnight.

16 MACER, *Duties of Governor, book 1:* It is warned by *senatus consultum* that only very sparingly should jurisdiction be exercised in relation to obligations contracted by provincial rulers or their aides and freedmen before entry into the province; this on the proviso that such actions as were on that ground not instituted are restored after any such person has departed from the province in question. If, however, something befalls a person quite against his will, for example, if he is a victim of an act of *injuria* or of theft, jurisdiction should be exercised up to the point of *litis contestatio*, and of production and bailment of allegedly stolen property or of a promise by the other party with payment of security for appearance or production of the thing.

17 CELSUS, *Digest, book 3:* If a provincial governor should happen to execute a manumission or appoint a tutor before he has had notice of his successor's arrival, these acts will be valid.

18 MODESTINUS, *Rules, book 5:* There is a plebiscite in which it is laid down that no governor shall accept any bounty or gift, save of eatables or drinkables such as may be consumed within a day or two.

19 CALLISTRATUS, *Judicial Examinations, book 1:* The administrator of justice ought to see that he makes himself easily approachable, but that he does not put up with any contempt of his court. Hence, it is added to warrants of appointment that provincial governors shall not admit citizens of the province into too close familiarity; for conversation on terms of equality breeds contempt. 1. But also when trying cases he must not go off like a firework at those whom he thinks wicked, nor be moved to tears by the entreaties of those who have fallen upon evil days. For it is not in the character of a firm and right-minded judge that his expression gives a clue to his emotions. And in sum, one ought so to conduct one's court that by one's personal excellence one enhances the authority of the high rank one holds.

20 PAPINIAN, *Replies, book 1:* The imperial legate, that is, the governor or co-ruler of a province, does not lose his command by abdicating it.

21 PAUL, *Duties of Assessors, sole book:* When a governor is conducting a hearing into a case of corruption of a slave or of debauchery of a serving maid or of buggery of a slave, if it should be alleged that the slave-overseer of some absent person has been corrupted, or a slave corrupted who is of such a kind that the matter extends not simply to the hurt done to the essential quality [of that slave] but to the perversion of the whole household, then he ought to take a very severe view of the case.

19

DUTIES OF IMPERIAL PROCURATOR OR *RATIONALIS*

1 ULPIAN, *Edict, book 16:* Whatever acts and deeds are performed by the imperial procurator, they obtain the same force and validity from him as if they had been done by the emperor. 1. If the imperial procurator makes a conveyance of a piece of property which belongs to the emperor as being his own property, then in my opinion he does not transfer ownership. For he transfers it in those cases in which he executes the conveyance as Caesar's agent with his express consent. Accordingly, if he should purport to act by way of sale or gift or settlement out of court, his act is a nullity. For his commission is not to alienate Caesar's property, but to administer it carefully. 2. It is a special feature of the imperial procurator that by his order a slave of the emperor can enter on an inheritance and that the procurator can, if the emperor should be named as heir, intermeddle with a rich inheritance and thereby perfect the emperor's heirship.

2 PAUL, *Views, book 5:* But if the estate to which the emperor is appointive heir be insolvent, the emperor is consulted once the matter has been thoroughly reviewed. For there must be inquiry as to the wishes of the appointive heir concerning entry on or repudiation of such an inheritance.

3 CALLISTRATUS, *Judicial Examinations, book 6:* Imperial procurators do not have power of deportation, for this is a penalty which they are incompetent to decide upon. 1. If, however, they should ban someone from entering lands belonging to the emperor as being of riotous disposition or otherwise injurious to the emperor's tenants, that person must keep off; so it was laid down in a rescript by the deified Pius Julius. 2. They do not then have power to permit any such person to come back; so it was laid down in a rescript of our present Emperors Severus and Antoninus anent an application by Hernias.

20

DUTIES OF THE *JURIDICUS*

1 ULPIAN, *Sabinus, book 26:* An adoption is competent in the court of the *juridicus*, since the statutory action-at-law (*legis actio*) is covered by his grant of power.

2 ULPIAN, *Sabinus, book 39:* By enactment of the deified Marcus, it has been granted to the *juridicus* who holds office at Alexandria that he may appoint tutors.

21

DUTIES OF ONE TO WHOM JURISDICTION IS DELEGATED

1 PAPINIAN, *Questions, book 1:* Any powers specially conferred by statute or *senatus consultum* or imperial enactment are not transferable by delegation of a jurisdiction. But the competence attached to a magistracy as of right is capable of delegation. Accordingly, magistrates are held to be in the wrong if they delegate their jurisdiction insofar as they are charged with the conduct of a criminal court under a statute or a *senatus consultum*, such as the *lex Julia de adulteriis* and any other like acts. The most powerful proof of this point is that it is expressly envisaged by the *lex Julia de vi* that anyone to whom its enforcement belongs may delegate that function if he goes away. Accordingly, he may only delegate after the commencement of his absence, since otherwise there would actually be a delegation by someone present in the city. Again if there should be an allegation that a master has been murdered by his household slaves, the praetor may not delegate the task of hearing the case, which he has under a *senatus consultum*. 1. One who has undertaken a delegated jurisdiction has no competence of his own but exercises the jurisdiction belonging to the officer who gave him his mandate. It is all too true that by the custom of our fathers *jurisdictio* (the power to declare rights) is transferable, but not the pure power of imperation which is conferred by a statute. Hence, no one holds that a proconsul's legate has power of punishment by a delegation of jurisdiction. PAUL notes: Where a power of imperation is inherent in a jurisdiction, the better view is that that power passes with delegation of the jurisdiction.

2 ULPIAN, *All Seats of Judgment, book 3:* When jurisdiction is delegated by a governor, his counselling functions cannot be carried out by the delegate. 1. If tutors or curators would like to sell landed estates, then only if good cause is shown may the praetor or governor permit them to. But if he has delegated his jurisdiction, by no means does that delegation carry with it power to deal with this question.

3 JULIAN, *Digest, book 5:* Even though it be a praetor who is exercising someone else's jurisdiction, still he does not act with the power of his own office but with that of the person by whose mandate he holds jurisdiction, so long as he is carrying out that person's functions.

4 MACER, *Duties of Governor, book 1:* Conduct of the trial in a case of "suspect tutors"

can be delegated. Indeed, it has been decided that for the benefit of *pupilli* such a delegation takes effect even under a general delegation of jurisdiction; the words of the enactment are: "The Emperors Severus and Antoninus to Braduas, Proconsul of Africa. Since you have granted to your legates the same jurisdiction as yourself, it follows that they have power to hold trials even concerning suspect tutors." 1. There may be delegation in the following cases: power to grant *bonorum possessio*; power to order possession by a person from whom the *cautio damni infecti* (guarantee against threatened damage) has been withheld; power to put a woman in possession of something in the name of her unborn child; and power to put a legatee in possession of something for the sake of preserving legacies.

5 PAUL, *Plautius, book 18:* It is obvious that one cannot delegate to another a jurisdiction which one holds by delegation. 1. When a jurisdiction is delegated to a private citizen, it seems that there is also delegated a power of imperation, albeit not a pure one; for there is no such thing as a jurisdiction without some modicum of coercive power.

22

DUTIES OF ASSESSORS

1 PAUL, *Duties of Assessors, sole book:* Practically every duty of an assessor (duties in performance of which students of the law exercise their skills) is comprised in the following heads: judicial hearings, motions, applications by writ, edicts, decrees, missives.

2 MARCIAN, *Criminal Trials, book 1:* Freedmen can act as assessors. But although people under *infamia* are not forbidden so to act by any statutes, nevertheless, I am of the opinion that they cannot perform the duties of an assessor, and it is reported that there is an enactment to this effect by imperial decree.

3 MACER, *Duties of Governor, book 1:* If a single province is subsequently divided and set up under two governors, as in the case of Germania and Mysia, someone who is a native of one part may act as assessor in the other, and he is not held to be acting as assessor in his own province.

4 PAPINIAN, *Replies, book 4:* When an imperial legate dies, the members of his staff are entitled to payment of their salary for the rest of the time of their appointments as made by the legate, provided they have not since then been at the same time members of someone else's staff. A different rule holds in case of one who received his successor ahead of time.

5 PAUL, *Views, book 1:* It is absolutely impermissible for a panel member while he is acting as an assessor to smuggle his own affairs into his own audience chamber; to have them raised in someone else's is not forbidden.

6 PAPINIAN, *Replies, book 1:* The advisory panel of the curator of a municipality is not closed to a man who belongs to that same *civitas*, since he receives no government salary.

BOOK TWO

1

THE ADMINISTRATION OF JUSTICE

1 ULPIAN, *Rules, book 1:* The powers of one who administers justice are of the widest. For he can grant *bonorum possessio,* order *missio in possessionem,* appoint tutors for a *pupillus* who lacks them and judges for litigants.

2 JAVOLENUS, *From Cassius, book 6:* One who administers justice is granted all those powers without which justice cannot be administered.

3 ULPIAN, *Duties of Quaestor, book 2: Imperium* is simple or mixed. To have simple *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas. Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio.* Such jurisdiction includes also the power to appoint a judge.

4 ULPIAN, *Edict, book 1:* To order security to be given by means of a praetorian stipulation and *missio in possessionem* are matters pertaining more to *imperium* than the administration of justice.

5 JULIAN, *Digest, book 1:* It has been provided by ancestral custom that a person may delegate the administration of justice to another only where he has it in his own right and not by the favor of another,

6 PAUL, *Edict, book 2:* because the administration of justice is not primarily entrusted to him and the statute itself does not grant but confirms a delegated administration of justice. Hence, if the person who has delegated the administration of justice dies before the person to whom it has been delegated has begun to exercise it, Labeo says the delegation is dissolved just as in other matters.

7 ULPIAN, *Edict, book 3:* If anyone should maliciously obliterate from a tablet, paper, or other material what has been stated with respect to jurisdiction to be exercised permanently, not that to be held only for a single occasion, an action, which anyone may bring, is given against him for five hundred aurei. 1. Slaves and sons-in-power are also included in the words of the edict. Moreover, the praetor includes both sexes. 2. But should anyone obliterate the notice while it is being put up or before it has been put up, the words of the edict will not strictly apply. However, Pomponius says that the principle of the edict should be extended to these cases. 3. Torture is to be applied to slaves not defended by their masters and to those who are destitute. 4. Mention of malice is made in the words of the edict, and so a person is not liable where he acted through ignorance or lack of education or on the orders of the praetor himself or by accident. 5. Indeed, one who removes the notice is liable under this edict even though he does not obliterate; also liable are both one who acts himself and one who delegates to another. But if one did the deed without malice while the other instigated him with malice, the latter will be liable. If both acted with malice,

both will be liable. For if several have joined in the act either by obliterating themselves or by delegating to others, they will all be liable.

8 GAIUS, *Provincial Edict, book 1:* Indeed, to this extent that it is not sufficient for one of them to pay the penalty.

9 PAUL, *Edict, book 3:* If someone's household slaves should obliterate the tablet, the rule of the edict is different from that obtaining in the case of theft, where an action is not given in respect of the others provided that the master, when he was willing to defend, paid in the name of one of them as much as a free man would pay. Perhaps the reason for the difference is that in this case the affront to the praetor's dignity is avenged and that several distinct acts are understood to have been committed. The position is the same where several slaves have insulted someone or caused damage because several acts are understood to have been committed, not just one act as in the case of theft. Octavenus also says that the master is to be afforded relief in this case. This is true if the slaves maliciously contrived that someone else should obliterate the tablet, because then there is one plan, not several deeds. Pomponius notes the same in his tenth book.

10 ULPIAN, *Edict, book 3:* One who administers justice should not do so in cases involving himself or his wife or his children or his freedmen or others whom he has with him.

11 GAIUS, *Provincial Edict, book 1:* Where the same plaintiff brings against the same defendant several actions and each is for an amount within the limit set upon the jurisdiction of the judge, then, although totaled together the amounts exceed that limit, Sabinus, Cassius, and Proculus have decided that the judge may hear the case. This opinion has been confirmed by a rescript of the Emperor Antoninus. 1. But if there are cross actions, the one party seeking an amount below the limit, the other an amount above the limit, both actions must be brought before the same judge, that is, before the judge with jurisdiction to hear the smaller claim. The reason is lest it be in the power of my adversary, who may be vexatious, to determine whether I may bring my case before this judge or not. 2. If several people have one action, for example, the action for dividing an inheritance, that for dividing common property or that for regulating boundaries, with respect to the jurisdiction of the judge who hears the case, ought we to look at the amount of each individual claim, as is the opinion of Ofilius and Proculus, because each party sues in respect of his own share, or rather at the amount of the whole claim, because the whole claim is determined in the case and possibly could be adjudged to one party, as is the opinion of Cassius and Pegasus? And, indeed, the opinion of the latter is the more probable.

12 ULPIAN, *Edict, book 18:* Municipal magistrates are not allowed to impose severe punishment on slaves, but the power to inflict moderate chastisement is not to be denied them.

13 ULPIAN, *Sabinus, book 51:* It is proper that he who orders anyone to act as judge be a magistrate. 1. However, magistrates or one who exercises some authority, for example, a proconsul or praetor or others who govern provinces cannot order anyone to act as judge on a day by which they will have become private individuals.

14 ULPIAN, *Edict, book 39:* It is received opinion, and we adopt the rule that if someone of higher or equal rank submits himself to the jurisdiction of another, a decision may be given for or against him.

15 ULPIAN, *All Seats of Judgment, book 2:* Where one praetor has been approached in mistake for another, the proceedings will have no validity. For one who alleges that they have agreed on the governor should not be heard since, as Julian writes, those who are in error do not consent; for what is so inconsistent with consent as a mistake exposing ignorance?

16 ULPIAN, *All Seats of Judgment, book 3:* The praetor is accustomed to delegate the

administration of justice either in entirety or for a particular case, and he to whom the administration of justice has been delegated acts in place of the person who has delegated, not in his own right.

17 ULPIAN, *Opinions, book 1:* The praetor can delegate the entire administration of justice to another just as he can delegate in respect of certain persons or a particular case, especially when he has a good reason in that before becoming a magistrate, he had been advocate for one of the parties.

18 AFRICANUS, *Questions, book 7:* If the parties agreed that a praetor other than the one to whom the administration of justice belongs should exercise jurisdiction and before application is made to him changed their minds, there is no doubt that no one is compelled to abide by an agreement of this kind.

19 ULPIAN, *Fideicommissa, book 6:* When a certain girl defended an action before a competent judge, then was condemned, and afterward married a man subject to another's jurisdiction, the question is asked whether the sentence of the former judge can be carried out. I said that it could because judgment has been pronounced beforehand. If the marriage had taken place after the start of the hearing but before the passing of sentence, I should think the same, and sentence is properly passed by the first judge. The same rule should be observed generally in all cases of this kind. 1. Insofar as a question of amount arises in determining jurisdiction, what is relevant is always the amount claimed not the amount owed.

20 PAUL, *Edict, book 1:* One who administers justice beyond the limits of his territory may be disobeyed with impunity. The same applies where he purports to administer justice in a case exceeding the amount established for his jurisdiction.

2

THE SAME RULE WHICH ANYONE MAINTAINS AGAINST ANOTHER IS TO BE APPLIED TO HIM

1 ULPIAN, *Edict, book 3:* This edict has the greatest equity without arousing the just indignation of anyone; for who will reject the application to himself of the same law which he has applied or caused to be applied to others? 1. "If one who holds a magistracy or authority establishes a new law against anyone, he himself ought to employ the same law whenever his adversary demands it. If anyone should obtain a new law from a person holding a magistracy or authority, whenever his adversary subsequently demands it, let judgment be given against him in accordance with the same law." The reason, of course, is that what anyone believed to be fair, when applied to another, he should suffer to prevail in his own case. But we construe these words "what he who is in charge of the administration of justice has established" as referring to the effect of a decision not to the words in which it is formulated. Therefore, the edict does not apply if he wishes to establish a rule but is prevented, and the decree had no legal effect. For the word "established" means that the matter has been concluded and the wrong completed not merely begun. And, therefore, if anyone should administer justice between parties over whom he had no jurisdiction, since the proceedings are held to be void and there is no decision, we think that the edict is not applicable. For what harm has been done by an attempt when the wrong has had no effect?

2 PAUL, *Edict, book 3:* By this edict, the malice of one administering justice ought to be punished; certainly if, through the ignorance of an assessor, justice is not administered as it should have been, this should prejudice not the magistrate but the assessor himself.

3 ULPIAN, *Edict, book 3:* If anyone should obtain the application of an unjust law against another, he is subject to the same law only if this was brought about at his request. But if he did not himself make the request, he is not punished. However, if he succeeded in his object, he is punished under the edict, whether he used some law or obtained leave to use it although he did not put it to use. 1. If my procurator has made the request, the question arises to whom the same law should be applied. And Pomponius thinks that it should be applied to me alone, at least if I have given a mandate for this particular purpose or ratified the procurator's act. But if the tutor or curator of a lunatic or young person has made the request, he himself is punished under this edict. It is to be observed that the same applies to the procurator if he has been appointed to act on his own account. 2. This penalty is established for all who come within the scope of the edict at the suit not only of one who has been injured by such a person but of anyone who brings an action at any time. 3. If one on whose behalf you have become surety should obtain leave that some debtor of his should not raise a particular defense against him and then you in connection with the affair in which you have become surety wish to raise the defense, it will not be proper that either you or he obtain leave to do this even though in the meantime you suffer a wrong if your debtor is insolvent. But if you have fallen within the terms of the edict, the principal debtor, indeed, but not you, may raise the defense. Nor will the penalty falling on you affect the principal debtor, and, therefore, you will not have the action on mandate. 4. If my son in connection with a magistracy falls within the terms of this edict, does it apply to those actions which I bring on his behalf? And I do not think it applies, lest my position should be made worse. 5. But when the praetor states that a person is subject to the same law, is this penalty also to be transmitted to his heir? And Julian writes that the action is to be refused not only to the person himself but also to his heir. 6. He also writes, not without reason, that he suffers the penalty of the edict not only in respect of those actions which he had at the time when he fell within its scope but also in respect of those which are acquired for him afterward. 7. Julian thinks that this is not a ground for allowing recovery of what has been paid; for there remains a ground in natural law which prevents recovery.

4 GAIUS, *Provincial Edict, book 1:* The praetor appropriately introduces this defense "unless any of them should act against a person who himself had committed some of these acts." And this is right lest, of course, either a magistrate, while he is striving to maintain this edict, or a litigant, while he wishes to have its benefit, should himself incur the penalty of the very same edict.

3

IF ANYONE SHOULD NOT OBEY ONE WHO ADMINISTERS JUSTICE

1 ULPIAN, *Edict, book 1:* All magistrates with the exception of *duumviri* are allowed, in accordance with the right inherent in their authority, to enforce their administration of justice by means of a penal judgment. 1. A person is not held to have obeyed one administering justice if he has not carried out the last step required in the exercise of justice. For example, if someone has not allowed a movable to be vindicated from him but has allowed it to be led or taken away, he is held to have obeyed. But if he has refused to allow even these subsequent measures, then he is not held to have obeyed. 2. If your procurator or tutor or curator has not obeyed one administering justice, he himself is punished, not the principal or the *pupillus*. 3. Labeo says that not only a defendant who has not obeyed is liable under this edict but also a plaintiff. 4. This action lies not for the plaintiff's interest but for the actual amount concerned in the litigation. And as it lies purely for a penalty, it is not given after a year nor against the heir.

4

SUMMONING TO COURT

1 PAUL, *Edict, book 4:* To summon to court is to summon for the purpose of litigation.

2 ULPIAN, *Edict, book 5:* It is not proper that a consul, prefect, praetor, proconsul, or other magistrate be summoned to court, since they hold *imperium* and can punish anyone and order him to be imprisoned. Nor should a priest be summoned while he is performing sacred rites, nor those who on account of the sanctity of a place cannot move from it, nor one who is being transported by public horse on public business. Furthermore, a man taking a woman in marriage ought not to be summoned, nor the bride, nor a judge while hearing a case, nor a man while he is conducting some case before the praetor, nor one who is conducting the funeral of a member of his household or is performing the rites for the dead,

3 CALLISTRATUS, *Judicial Examinations, book 1:* nor those attending a funeral, and this is also held to have been approved by a rescript of the divine brothers,

4 ULPIAN, *Edict, book 5:* nor those who on account of litigation necessarily have to be present in court or at a certain place, nor lunatics or children. 1. The praetor says: "Let no one summon to court without my permission a parent, patron or patroness, or the children or parents of a patron or patroness." 2. Parent here is to be understood as referring to both sexes; it is a question whether it refers to any degree whatever. Some say the word expresses lineal relatives up to great-great-great-grandparent and that those of a more remote degree are called ancestors. Pomponius reports that the old jurists thought this, but Gaius Cassius says the word expresses all lineal ascendants of whatever degree. This is the more worthy opinion and deservedly has prevailed. 3. Labeo thinks that those who have produced children in slavery are also to be considered parents and that the term is not applicable, as Severus said, only in the case where the children are legitimate. But if a son has been born in promiscuity, he shall not summon his mother to court,

5 PAUL, *Edict, book 4:* because she is always identifiable even if the son has been conceived in promiscuity. The father indeed is declared by the marriage.

6 PAUL, *Views, book 1:* No one can summon natural parents to court; for the same respect should be observed toward all parents.

7 PAUL, *Edict, book 4:* A person summons the parents of his adoptive father with impunity since they are not his parents, as he becomes related cognatically only to those to whom he is also related agnatically.

8 ULPIAN, *Edict, book 5:* A son cannot summon to court an adoptive father as long as he is in power, and this is so more by virtue of his being in power than the praetor's decree, unless he has a *peculium castrense*; for then permission may be given on cause being shown. But he cannot summon his natural parent, even while he is in the adoptive family. 1. "Patron," the praetor says, "and patroness." Here patrons are to be understood as those who have manumitted from slavery. A person is also understood to be patron if he has disclosed a collusive act (by which someone has been declared freeborn). The same holds in the case of someone pronounced in a preliminary investigation to be free, although in fact he was not, or in a case where I swore that someone is my freedman. On the contrary, I will not be held to be patron if judgment is given against me or if, where I have put someone on oath, he swore that he was not my freedman. 2. But if I have put my freedman or freedwoman on oath not to marry, I shall be summoned with impunity. Celsus, indeed, says that in the case of such a freedman the right [not to be summoned] does not pass to my son in my lifetime. But Julian writes to the contrary. Most approve the opinion of Julian. Accordingly, the

result is that the patron indeed may be summoned but not his son who is treated as innocent.

9 PAUL, *Edict, book 4:* Also one who manumits on the ground of a *fideicommissum* ought not to be summoned, although he may be summoned so that he manumit.

10 ULPIAN, *Edict, book 5:* But if I have bought a slave on condition that I manumit him and in accordance with the constitution of the divine Marcus he attains freedom, since I am patron, I shall not be able to be summoned. But if I have bought him with his own money and have broken faith, I shall not be held to be patron. 1. A slave-woman who became a prostitute, contrary to the conditions of sale, will have the seller as patron if she is sold on condition that should she be made a prostitute, she shall become free. But if the seller reserved the right to take the woman back [in these circumstances] and has himself made her a prostitute, seeing that she still attains freedom, she does so indeed in virtue of the act of the seller, but it is not equitable that honor be paid to him [as patron]. Marcellus also thought this in the sixth book of his *Digest.* 2. Again, we understand a person to be patron even if he has incurred a change of civil status or if his freedman has incurred such a change, where he has fraudulently procured the status of being a free person. For since he conceals his condition in the very proceeding by which his status is changed, he is not held to have been effectively made free-born. 3. But even if he has received the right to wear gold rings, I think that he ought to show respect to his patron although he has all the attributes of free birth. It is otherwise if he is restored to the status of his birth, for the emperor makes him free-born. 4. One who is manumitted by some guild or corporation or city, may summon the members as individuals; for he is not their freedman. But he ought to consider the honor of the municipality, and, if he wishes to bring an action against a municipality or a corporation, he ought to seek permission under the edict although he intends to summon a person who has been appointed their agent. 5. We ought to understand children and parents of a patron and patroness to be of both sexes. 6. But if through the penalty of deportation a patron is reduced to the status of a foreigner, Pomponius thinks that he has lost the honor. But should he be restored, the benefit of this edict will also be secured to him. 7. We understand the parents of a patron to include also adoptive parents but only for as long as the adoption lasts. 8. If my son is given in adoption, he cannot be summoned by my freedman, nor can my grandson born in the adoptive family. But if my emancipated son adopts a son, this grandson can be summoned by my freedman for he is not related to me. 9. According to Cassius, we take children, as in the case of parents, to comprise descendants even beyond those in the fifth degree. 10. If a freedwoman has a child by her patron, she herself and her son may not summon each other. 11. But if the children of a patron have accused their father's freedman of a capital offense or sought to reduce him to slavery, no honor is owed to them. 12. The praetor says: "Let no one summon without my permission." For he will give permission if the action brought against the patron or his parents is not infaming or does not suggest disgraceful conduct; he ought to do this on cause being shown. For at times, as Pedius thinks, he ought to permit a patron to be summoned by his freedman, even on an infaming ground, as where he has inflicted on him some very serious injury, perhaps a flogging. 13. But this honor should always be paid to a patron even if he appears as tutor or curator or defender or agent of another. But if a tutor or curator appears for the patron, Pomponius writes that he can be summoned with impunity; and this is true.

11 PAUL, *Edict, book 4:* Although the praetor does not add that he will grant a penal action only on cause being shown, yet Labeo says that some limitation is to be placed on the way he administers justice, for example, if a freedman repents and gives up the action or if a patron when summoned does not appear or if he is summoned not against his will. Certainly, the words of the edict do not admit of this interpretation.

12 ULPIAN, *Edict, book 57:* If a freedman, contrary to the praetor's edict, shall

summon the son of his patron whom the patron himself has in power, it is regarded as right that in the absence of the father, help should be afforded the son who is in power and that the penal action *in factum*, that is, for fifty aurei, be available to him against the freedman.

13 MODESTINUS, *Encyclopaedia, book 10:* Generally, we cannot summon to court, without the order of the praetor, those persons to whom respect is owed.

14 PAPINIAN, *Replies, book 1:* A freedman sued by his patron is not held to summon the plaintiff patron when, in the preparations for his defense, he makes frequent application to the governor of the province in his court.

15 PAUL, *Questions, book 1:* A freedman petitioned the emperor against his patron and did not disguise the fact that he was his freedman. Is the penalty of the edict to be remitted if he obtains the rescript which he sought? I replied that I do not think that the edict of the praetor relates to this case. For one who petitions the emperor or the governor is not held to summon his patron.

16 PAUL, *Replies, book 2:* The question is raised whether a tutor suing in the name of a *pupillus* can summon his own patroness without the praetor's permission. I replied that the subject of the question, suing in the name of a *pupillus*, could even summon his patroness without the permission of the praetor.

17 PAUL, *Views, book 1:* A person who has given an undertaking at a magistrate's office on behalf of someone is compelled to produce him. Likewise, where he made a promise to produce someone and recorded it on the court rolls, he is compelled to produce him even though he has given no undertaking at the office.

18 GAIUS, *XII Tables, book 1:* Most thought that no one can be summoned from his house because this is an individual's safest refuge and shelter and one who summons him from there is held to exercise force.

19 PAUL, *Edict, book 1:* It is certain that a sufficient penalty is imposed on one who does not defend but lies hidden because his opponent is granted *missio in possessionem*. But if he makes himself accessible or is seen in public, Julian rightly says that he can be summoned.

20 GAIUS, *XII Tables, book 1:* But also no one doubts that it is lawful to summon a person from the door of his house, the baths, and the theater.

21 PAUL, *Edict, book 1:* But although one who is at home can at times be summoned, yet no one ought to be dragged from his house.

22 GAIUS, *XII Tables, book 1:* Nor is it permitted to summon girls below puberty who are in another's power. A man who is summoned is to be discharged in two cases: if anyone defends him and if, before the case is heard, the affair is settled.

23 MARCIAN, *Institutes, book 3:* Where several people have a freedman in common, he ought to request the praetor for permission to summon any one of his patrons in particular, lest he incur the penalty provided by the praetor's edict.

24 ULPIAN, *Edict, book 5:* Against one who acts contrary to these provisions an action for fifty aurei is given. This action is not available to the heir [of the patron] nor against the heir [of the freedman] nor beyond a year.

25 MODESTINUS, *Penalties, book 1:* If, without obtaining permission under the edict, a freedman summons his patron, on a complaint made by the latter, he either pays the above mentioned penalty, that is, fifty aurei, or he is punished by the urban prefect on the ground of his disrespect if he is found to be without resources.

5

IF ANYONE SUMMONED TO COURT DOES NOT APPEAR OR IF ANYONE HAS SUMMONED ONE WHOM IN ACCORDANCE WITH THE EDICT HE OUGHT NOT TO HAVE SUMMONED

1 ULPIAN, *Edict, book 1:* If anyone should provide, as a guarantor for his appearance at the hearing, someone who is not subject to the jurisdiction of the person before whom he is summoned, the guarantor will be held not to have been given unless he should specifically renounce his right.

2 PAUL, *Edict, book 1:* A person summoned on any ground before the praetor or anyone else in charge of the administration of justice ought to appear so that the very fact might be determined whether there is jurisdiction in respect of him. If anyone summoned does not appear, on cause being shown, he will be condemned by a competent judge to a fine within the jurisdiction of the judge to impose; to be sure, a man of no education ought to be spared. Likewise, if the plaintiff had no interest in the appearance of his adversary at the particular time, the praetor remits the penalty, for example, because the day was a holiday.

3 ULPIAN, *Sabinus, book 47:* When anyone promises to appear in court and does not add a penalty to be paid if he should not appear, it is very true that an action for an indefinite amount to the extent of the plaintiff's interest should be brought against him, and so Celsus also writes.

6

LET THOSE SUMMONED EITHER APPEAR OR PROVIDE A GUARANTOR OR GIVE AN UNDERTAKING

1 PAUL, *Edict, book 1:* It is provided in the edict that a guarantor given to secure appearance in court should have property appropriate to the status of the defendant, an exception being made in the case of closely related persons. For in this case, the praetor orders anyone to be accepted, as where someone acts as guarantor for his parent or patron,

2 CALLISTRATUS, *Monitory Edict, book 1:* likewise for his patroness or his children or his wife or his daughter-in-law. For in these cases, it is ordered that any guarantor at all be accepted. And an action for fifty aurei lies against a plaintiff who does not accept a guarantor in these circumstances although he knew that a close relationship existed,

3 PAUL, *Edict, book 4:* since, in the case of closely related persons, any guarantor is accepted as having sufficient property.

4 ULPIAN, *Edict, book 58:* Where someone promises that two men will appear in court and produces one but not the other, he is not held to have kept his promise since one of them has not been produced.

7

LET NO ONE REMOVE BY FORCE ONE WHO IS SUMMONED TO COURT

1 ULPIAN, *Edict, book 5:* The praetor has issued this edict so that he might restrain by fear of a penalty those who forcibly snatch away persons summoned to court. 1. Indeed, Pomponius writes that a noxal action in the name of a slave is also to be given, unless he acted with the knowledge of his master; for then the action lies against the latter without the alternative of noxal surrender. 2. Ofilius thinks that this edict does not apply if a person who could not be summoned is removed, for example, a patron, parent, and other persons. This opinion seems correct to me. And,

indeed, if the one who summons has committed a wrong, the one who removes has not.

2 PAUL, *Edict, book 4:* For although both the freedman who summons his patron and the one who forcibly removes him contravened the edict, yet the freedman who undertakes the part of plaintiff and so commits a similar wrong is in the worse position. The same rule of equity applies in the case of one who is summoned to a place other than the one to which he should have been summoned. But it must even more firmly be said that he does not seem to have been forcibly removed when there was no right to bring the action at that place.

3 ULPIAN, *Edict, book 5:* But if anyone removes a slave summoned to court, Pedius thinks that the edict does not apply since he was not a person who could be summoned. What then is the position? The action for production will lie. 1. If anyone should remove a person summoned before a subordinate judge (*pedaneus iudex*), the penalty provided by the edict will not apply. 2. When the praetor says, "forcibly remove," does he mean force, or must there be also malice? Is it enough if force has been used although malice is not present?

4 PAUL, *Edict, book 4:* But "remove" is a general word, as Pomponius says. For to seize is to take from someone's hands by violence, to remove is to take away by any method. For example, if a person has not seized someone but contrives a delay which prevents his appearing in court, so that the day for the action passes or the property sought is lost by lapse of time, he is held to have removed, although he has not removed the individual himself. Again, if he has kept someone in a particular place and not taken him away, he is liable under these words. 1. Likewise, if anyone removes a person summoned through a false accusation, it is decided that he is liable under this edict. 2. The praetor says: "Let nothing be done maliciously by which his removal may be facilitated." For removal can occur without malice as where there is a lawful ground for it.

5 ULPIAN, *Edict, book 5:* If anyone should remove by means of another, he is liable under this clause, whether he was present or absent. 1. Moreover, an *actio in factum* is given against a person who has removed by force. This action lies not in respect of the actual state of affairs but to recover the amount at which the matter in dispute is estimated by the plaintiff. For this is added to make it clear that even if someone makes a false accusation, he may still recover this penalty. 2. However, he ought to show that it was as a result of the removal in question that he was not produced in court. But if he is nonetheless produced, the penalty does not apply since the words [of the edict] are to be interpreted as referring to the result. 3. This action is *in factum.* If several persons have offended, it will be given against them individually. The person who has been removed nevertheless remains bound. 4. Moreover, the action will be granted to heirs if in their interest but not against the heir nor after one year.

6 ULPIAN, *Edict, book 35:* One who removes a debtor by force, if he pays, does not release the debtor because he pays his own penalty.

8

THOSE WHO ARE COMPELLED TO GIVE SECURITY OR PROMISE BY OATH OR WHO ARE LIABLE UNDER THEIR OWN PROMISE

1 GAIUS, *Provincial, Edict, book 5:* The giving of security means the same as the giving of satisfaction. For just as we are said to satisfy someone whose request we are fulfilling, so we are said to give security to our adversary when, on account of what he

claims from us, such security is given that we make him safe on this head by the provision of guarantors.

2 ULPIAN, *Edict, book 5:* A guarantor to secure appearance in court is held to be acceptable by reference not only to his resources but also to the convenience with which he may be sued. 1. If anyone should provide a guarantor to secure the appearance in court of persons who could not sue, the providing of the guarantor is ineffective. 2. The praetor says: "If anyone summons to court a parent or patron or patroness, the children or parents of a patron or patroness or his own children or one whom he has in his power or his wife or his daughter-in-law, any person may be accepted as guarantor to secure appearance." 3. When the praetor says, "or his own children," we understand this to include grandchildren descended through women. And we give this privilege to a parent not only if he is independent but even if he is in someone's power. For Pomponius writes to this effect. And a son can become guarantor for his father even if he is in the power of another. Also one ought to understand a son's wife as including a grandson's wife, and so on. 4. The praetor's statement "any person may be accepted as guarantor" applies to property, that is, even a person who is not wealthy is acceptable. 5. The praetor grants an action against a guarantor who has promised that someone will appear in court for as much as the affair is worth. Let us see whether this means the true loss or a specific amount. And the better opinion is that the guarantor is liable in respect of the true loss unless he has incurred liability for a specific amount.

3 GAIUS, *Provincial Edict, book 1:* Whether the action is for double or threefold or fourfold we say that the one and same guarantor is liable in every case for whatever the amount is, because the matter is understood to amount to so much.

4 PAUL, *Edict, book 4:* If one who gave a guarantor to secure his appearance in court should die, the praetor ought not to order him to be produced. But if, not knowing this, he orders production or the person should die after the praetor's decree but before the day appointed for production, an action will be denied. But if he dies or loses his citizenship after the day appointed for production, an action can effectively be brought.

5 GAIUS, *Provincial Edict, book 1:* If, indeed, someone has given a guarantee on behalf of a person who is condemned and the latter dies or loses Roman citizenship, an action nevertheless can properly be brought against his guarantor. 1. Where a person does not accept as surety for appearance in court a guarantor whose wealth is manifestly sufficient for the status of the defendant or one whose wealth, in a case of doubt, has been proved to be sufficient, the action for insult may be brought against him, because it is indeed no slight insult that a person who offers a sufficiently solvent guarantor should be brought into court. Again, the guarantor himself who has not been accepted can also bring an action on account of the insult to himself.

6 PAUL, *Edict, book 12:* Where the guarantee or security given is defective, it is held that no guarantee has been given at all.

7 ULPIAN, *Edict, book 14:* If it is not denied that a guarantor is solvent but he is said to object to the jurisdiction of the court and the plaintiff fears that he will exercise a right of objection, it must be seen what the law is. The deified Pius (as Pomponius also reports in his book of *Letters* and Marcellus in the third book of his *Digest* and Papinian in the third book of his *Questions)* issued a rescript to Cornelius Proculus to the effect that the plaintiff rightly refuses such a guarantor. But if a guarantee cannot otherwise be given, it must be made clear to the guarantor suggested that, if sued, he will not be able to exercise his privilege [of objection]. 1. If security is necessary and the defendant cannot readily produce it at the place where he is sued, he can be heard if he is

prepared to provide security in another city of the same province. But if provision of security is voluntary, it may not be effected in another place. For one who has placed on himself the necessity of giving security does not deserve a concession. 2. If security has not been given in an action relating to a movable and the person from whom security is desired is suspect, the movable ought to be deposited at the [appropriate] office, if this satisfies the judge, until either security is given or the action is concluded.

8 PAUL, *Edict, book 14:* It is customary for the litigants to agree in the stipulation on the fixing of a day [for the hearing]. If there is no agreement, Pedius thinks that for a reasonable period it is in the power of the promisee [to fix the day]. This must be decided by a judge. 1. One who produces a woman as surety is not held to have provided security. But neither is a soldier or someone under twenty-five to be approved unless such persons act as guarantors in respect of their own affairs, for example, as guarantors for their own procurator. Some also think that if dotal land is sought from a husband, the wife will be able to act as guarantor on her own account. 2. If someone who before joinder of issue has guaranteed compliance with the judgment is found to be a slave, relief must be afforded the plaintiff so that security is given anew. Relief should also be given to a person under twenty-five and perhaps also to a woman on the account of lack of experience. 3. If the person guaranteeing compliance with the judgment is the heir of the promisee or the promisee is heir of the guarantor, a fresh surety must be provided. 4. A tutor and curator are to be sent to the municipality so that they may give security for the safety of property belonging to a *pupillus*, because the giving of security is necessary. The same applies in the case of a person who has a usufruct with respect to giving security for the restoration of the property to the owner and in the case of a legatee with respect to giving security for the return of the legacy in the event of a third person acquiring title to the inheritance and for anything which he has taken beyond that allowed by the *lex Falcidia.* If the heir asks to be allowed to go to the municipality in order to give security with respect to the payment of legacies, he also is to be heard. Indeed, if *missio in possessionem* has been granted to a legatee when it was the fault of the heir that he gave no security and the heir demands that he give up possession and says that he is prepared to give security in the municipality, he ought not to succeed in his demand. The position is different if the legatee has been granted *missio in possessionem* without fault or fraud on the part of the heir. 5. A person is ordered to swear that he is not bringing a false accusation lest anyone, in order the more to vex his adversary, should summon him to the municipality when perhaps he could give security at Rome. But certain persons such as parents and patrons are not required to take the oath that no false accusation is being brought. Moreover, one who is sent back to the municipality ought to swear in this form: "that he cannot give security at Rome and can at the place where he asks to be sent and that he does not make the request vexatiously." For he is not compelled to swear in this form: "that he cannot give security otherwise than in that place," because, if he cannot at Rome but can at several places, he is compelled to perjure himself. 6. But this will be allowed only if there seems to be a good reason. For what if, when he was in the municipality, he refused to give security? In this case, he ought not to succeed in his request since it was his own fault that he did not give security in the place where he wishes to go.

9 GAIUS, *Provincial Edict, book 5:* Where an *arbiter* has been appointed to approve guarantors, if the award seems unfair to one of the parties, an appeal is allowed from it in the same way as from a judge.

10 PAUL, *Edict, book 75:* If guarantors are approved by an *arbiter*, they are to be deemed to have sufficient means since a complaint can be laid before a competent judge who, on cause being shown, may reject those approved by the *arbiter* or otherwise approve those the latter had rejected. 1. All the more should a person who accepts guarantors of his own free will be content with them. But if, in the meantime, a serious misfortune or great poverty befalls the guarantors, on cause being shown, security must be given afresh.

11 ULPIAN, *Edict, book 75:* Julian says that if you, when about to bring an action to recover land, have accepted guarantors before I give you a mandate to sue and afterward on my mandate you begin the action, the guarantors are liable.

12 ULPIAN, *Edict, book 77:* All agree that an heir instituted under a condition, possessing the inheritance while the condition is in suspense, ought to give security to the substitute heir in respect of the inheritance. If the condition fails, the substitute may enter and bring the action for recovery of an inheritance; if he obtains the inheritance, the stipulation [about security] comes into effect. And very often the praetor himself, before the condition becomes operative or before the time at which the inheritance is claimed, on cause being shown, orders a stipulation to be given.

13 PAUL, *Edict, book 75:* Again, if several persons are substituted [as heirs], security must be given to each.

14 PAUL, *Replies, book 2:* A son-in-power defends an action brought against his absent father. I ask whether he ought to give security that the judgment will be satisfied. Paul replied that one who defends an absent person, whether he is son or father, ought to give security to the plaintiff in accordance with the provision of the edict.

15 MACER, *Appeals, book 1:* It is to be known that possessors of immovables are not compelled to give security. 1. Moreover, he is taken to be possessor who possesses land in the country or in the town, either solely or in part. Again, one who possesses *ager vectigalis*, that is, holds land under a contract of *emphyteusis*, is understood to be possessor. Likewise, one who has bare ownership is understood to be possessor. But Ulpian writes that one who has only a usufruct is not possessor. 2. A creditor who has received a pledge is not possessor even if he holds possession either because possession has been delivered to him or because he has allowed the debtor to hold the property by license. 3. If land is given as dowry, the wife as much as the husband is understood to be possessor on account of their possession of this land. 4. It is a different case with one who has a personal claim to land. 5. Tutors, whether their *pupilli* or they themselves are in possession, are deemed to be possessors. Moreover, if one of the tutors was possessor, the same applies. 6. If you claim from me land which I possessed, then, when judgment has been given in your favor, I appeal, am I possessor of the same land? And it is rightly said that I am possessor because nonetheless I possess, nor is it relevant that I can be evicted from that possession. 7. When one wishes to see whether someone is possessor or not, one is to look at the time at which security is given. For just as there is no detriment for one who sells possession after security has been given, so there is no benefit for one who begins to possess after it has been given.

16 PAUL, *Edict, book 6:* One who promises on oath that he will appear in court is not held to have sworn falsely if, for a permitted reason, he does not appear.

9

HOW PROVISION FOR A GUARANTEE MAY BE MADE WHERE A NOXAL ACTION IS BROUGHT

1 ULPIAN, *Edict, book 7:* If anyone promises that one who is the subject of a noxal action will appear in court, the praetor says that he ought, until issue is joined, to produce him in the same legal condition in which he is at that time. 1. Let us see what "in the same legal condition" means. And I think the correct position to be that the defendant is held to produce him in the same legal condition where, in the context of the action being brought, he does not make the plaintiff's right worse. If the slave ceases to belong to the promisor or the action is lost, Labeo says that he is not held to

have remained in the same legal condition and that the same applies where the position of the plaintiff with respect to the litigation was equal to that of the defendant and then becomes worse through change of either place or party. And so if the slave is sold to someone who cannot be sued in the same court as the promisor or is given to a more powerful person, he [Labeo] thinks the better opinion to be that the slave is not held to be produced in the same legal condition. Again, if he is noxally surrendered, Ofilius does not think that he is produced in the same legal condition since he thinks that a noxal action pertaining to others is destroyed by the surrender.

2 PAUL, *Edict, book 6:* But we adopt another rule. For someone surrendered noxally is not freed from the obligation attaching on prior grounds, since the offense follows him just as if he had been sold. 1. Where a slave, on whose account a noxal action is available to someone, is absent, if, indeed, the master does not deny that he is in his power, Vindius thinks that he can be compelled either to promise that the slave will appear or to join issue or, if he is unwilling to defend, that he should guarantee the slave's production as soon as possible. But if he falsely denies that the slave is in his power, then he must defend the action without the alternative of noxal surrender. And Julian writes that the position is the same if he fraudulently does something by which the slave ceases to be in his power. However, if the slave is present but the master is absent and no one defends, the praetor will order the plaintiff to lead him away. But, on cause being shown, the master will afterward be allowed to defend, as Pomponius and Vindius write, so that his absence should not prejudice him. And, therefore, the action, which had been destroyed because the slave by being led away falls into the bonitary ownership of the plaintiff, will be restored.

3 ULPIAN, *Edict, book 7:* If a noxal action is brought against a usufructuary and he does not defend the slave, his claim to the usufruct is disallowed by the praetor.

4 GAIUS, *Provincial Edict, book 6:* If a noxal action is brought against one master, ought he to provide security on behalf of his co-owner? Sabinus says that he should not, because, being under the necessity of defending the whole claim, he was in a certain manner defending the whole slave as his own, nor is he heard if he is prepared to defend on account of his own interest alone.

5 ULPIAN, *Sabinus, book 47:* If someone promises that a slave will be produced in the same legal condition and the slave appears after he has become free, if the dispute about him concerns a capital action or an insult, he does not rightly appear. The reason is that in the one case punishment appropriate to a free person is imposed, for example, a fine, and in the other case punishment appropriate to a slave, where for an insult he is beaten by way of satisfaction. But in relation to other noxal actions he seems even to have improved his legal condition [from the point of view of the plaintiff].

6 PAUL, *Sabinus, book 11:* But if a promise is made that a *statuliber* will appear, he is held to appear in the same legal condition, although he appears when free, because the chance of freedom was involved in his original condition.

10

ONE WHO PREVENTS ANOTHER APPEARING IN COURT

1 ULPIAN, *Provincial Edict, book 7:* The praetor considered it equitable to penalize the malice of a person who prevented another from appearing in court. 1. A person is considered to have acted maliciously not only where he keeps someone back with his own hands or by means of his followers but also where he has asked others to detain or abduct him so that he does not appear in court, whether they know or do not know what has been devised. 2. We understand malice to be present in this case, if someone gives bad news to a person on his way to court, on account of which he is obliged not to come, the former is liable in accordance with this edict although some think that the fault was with the latter who was credulous. 3. If the defendant through the

malice of the plaintiff has not appeared, he will not have against the latter the action arising from this edict since, if he is sued for a penalty on his stipulation on the ground that he has not come to court, he could make do with a defense. The position is different if he is prevented by someone else. For he will be able to bring the action in question against such a person. 4. If several have acted maliciously, all are liable. But if one pays the penalty, the others are freed, since the plaintiff now has no interest. 5. All agree that an action on this ground in the name of a slave is noxal. 6. It is available to the heir but not beyond a year. Moreover, I think that the action should be granted against the heir only to the extent that he should not profit from the malice of the deceased.

2 PAUL, *Edict, book 6:* If a slave of the plaintiff maliciously contrived that I should not appear in court and his master knew and did nothing to prevent the slave, although this was in his power, Ofilius says that I must be allowed a defense against the master lest a master should profit from the malice of his slave. If, indeed, the slave has so acted without the intention of his master, Sabinus says a noxal action must be granted and that the deed of the slave ought not to prejudice his master except to the extent that he be deprived of the slave, since he himself has done nothing wrong.

3 JULIAN, *Digest, book 2:* In accordance with this edict, an *actio in factum* lies against one who has maliciously contrived that a person summoned should not appear in court, the action lying to the extent of the plaintiff's interest that he should appear. In this action, there is taken into account anything the plaintiff has lost on account of that affair, for example, if the defendant in the meantime acquires by lapse of time ownership of the property or has been freed [by lapse of time] from the action. 1. Indeed, if one who has maliciously contrived that a person should not appear in court was not solvent, it is fair that the action for restitution (*restitutoria actio*) lie against the defendant himself lest he profit on account of another's malice and the plaintiff suffer loss. 2. If both the promisee through the malice of Titius and the promisor through the malice of Maevius have been prevented from appearing in court, each may bring the *actio in factum* against the person by whose malice he was prevented. 3. If the promisee through the malice of the promisor and the promisor through the malice of the promisee have been prevented from coming to court, the praetor ought to help neither since the malice on one side offsets that on the other. 4. If I have taken a stipulation for fifty from a guarantor if the defendant does not appear in court and was about to claim one hundred from the defendant and, through the malicious contrivance of Sempronius, the defendant does not appear in court, I shall be able to claim one hundred from Sempronius. For my interest seems to amount to so much because, if the defendant appeared in court, an action for one hundred was available to me against him or his heir, although the guarantor promised a lesser sum to me.

11

IF ANYONE DOES NOT HONOR A PROMISE GIVEN ON ACCOUNT OF APPEARANCE IN COURT

1 GAIUS, *Provincial Edict, book 1:* [In calculating the time to be allowed for appearance], the praetor allows one day for every twenty miles [the defendant has to travel] and adds as well the day on which the promise to appear is made and the day on which he is required to appear. For, indeed, the time allowed for the journey calculated in this way burdens neither litigant.

2 ULPIAN, *Provincial Edict, book 74:* We do not demand that the defendant appear in court if the matter on account of which he promised to appear has been settled; but this is so only if the matter was settled before he was due to appear. But if it was settled afterward, the defense of fraud ought to be raised. For who concerns himself with a promised penalty once the matter has been settled? Also one would think that

the defense that the matter has been settled would bar the plaintiff's case, as if there had also been a compromise about the penalty, unless the parties expressly agreed otherwise. 1. If anyone is prevented from appearing in court in accordance with his promise, on the ground of municipal duty without fraud on his part, it is most equitable that a defense be granted to him. 2. In a similar way, he will be given relief if, required elsewhere to give evidence, he could not arrive in time for the hearing. 3. If anyone promises that he will appear in court and cannot appear because prevented by means of health or storm or the violence of a river, he receives help by way of a defense. Nor is this undeserved; for since such a promise requires his presence, how could he appear if prevented by ill health? And so the *Law of the Twelve Tables* also requires the day of the hearing to be postponed if the judge or either of the litigants is prevented [from appearing] by a serious illness. 4. If a woman fails to appear not because she is ill but because she is pregnant, Labeo says a defense should be accorded her. But if she has left her bed after giving birth, it should be proved that she has been prevented from attending by something like illness. 5. The same applies where someone becomes mad; for he who is prevented by madness is prevented by illness. 6. What we have said as to relief being afforded even to one who is prevented from appearing through a storm or flood or violence of a river is to be understood to apply to storms both on sea and land. We ought to understand a storm such as constitutes an obstacle to a journey by sea or land. 7. It is also to be accepted that there may be violence of a river without a storm. We understand [the defense of] violence of a river [to apply] even if its width is an obstacle, as where a bridge has been destroyed or a boat is not available. 8. However, a person has created an obstacle for himself if he might have avoided a storm or the violence of a river by setting out earlier or sailing at a suitable time. In these circumstances, can it be said that the defense should not benefit him? This matter, indeed, is one which should be decided on cause being shown. For he is not to be so pressed that he can be asked why he did not set out long before the arrival of the day on which he had promised to appear. Nor again should he be permitted, if any fault is imputed to him, to plead storm or violence of a river as an excuse. For what if someone in Rome at the very time he made the promise to appear, not under the pressure of any necessity, should set out on a pleasure trip to a municipality? Is it not the case that he does not deserve to have this defense available as an excuse? Or what, indeed, if there was a storm at sea but he could come by land or bypass a river? Equally, it must be said that the defense will not always benefit him; there is an exception if shortage of time does not permit the journey to be undertaken by land or the river bypassed. When, however, either a river has overflowed to such an extent that it floods the whole place in which he ought to appear or some accidental disaster destroyed that place or makes his presence dangerous, this defense should be accorded him on grounds of justice and equity. 9. In a similar way, a defense is granted to one who, intending to come to the hearing, was kept back by a magistrate and kept back without fraud on his own part. For if he has attempted to contrive this or furnished a reason for it, the defense will not benefit him. But, indeed, it is his own fraud that will prejudice him, not the fraud of others who have contrived that he be kept back. But if a private individual has detained him, in no way will this defense benefit him.

3 PAUL, *Edict, book 69:* But an action will be given to him against the person keeping him back to the extent of his interest.

4 ULPIAN, *Edict, book 74:* Again, if anyone convicted beforehand in a capital matter could not appear for the hearing, he is deservedly pardoned. We ought to understand that he is convicted in a capital case when he is punished by death or exile. Should anyone ask what is the point of this defense for one who has been condemned, the reply may be made that it is necessary for his guarantors, or if by chance he has departed into exile with his citizenship intact, that defense will benefit whoever defends him. 1. It is to be known that one who did not appear because he was made defendant in a capital case is not in a position to use the defense; for it is granted to a person who has been condemned. To be sure, if he does not appear because he is in prison or in military custody, his position is such that he may use the defense. 2. Furthermore, a defense ought to be granted to a person prevented from attending by a funeral in his family. 3. Likewise, one who did not appear at the hearing because he was enslaved by the enemy ought to be given relief by way of a defense. 4. The question has been raised whether an agreement may be concluded that no defense be pleaded where a promise made on account of appearance in court has been broken. And Atilicinus says that such an agreement is not valid, but I think that it is valid, provided the grounds of the defense which have voluntarily been renounced by the promisor are expressly set out. 5. Likewise, the question is raised whether a defense is given to the guarantors of a person who is not required to give security on account of appearance in court and yet has promised with guarantors. I think it relevant whether he promised by means of guarantors through error or in accordance with an agreement; if through error, the defense will be granted to the guarantors; if in accordance with an agreement, it will not be given. For Julian writes that if, on account of appearing in court, more was promised through ignorance than was laid down, a defense ought to be given, but if in accordance with an agreement promise of such an amount was made, Julian says that the defense is to be nullified by a rejoinder based on the pact.

5 PAUL, *Edict, book 69:* If there are two promisees under a stipulation and the debtor promises one under a penalty that he will appear at the hearing but the other prevents him, a defense is given against the first promisee only if they are partners. The reason is that fraud in relation to partnership matters should not benefit the one who prevented. 1. Likewise, if there are two co-promisors and one did not appear in court, despising his promise to appear, and the plaintiff seeks from the one the matter of the dispute, from the other the penalty for not appearing, he will be met by the defense when seeking the penalty. 2. Equally, if a promise was made by a father that he will appear in court in a matter relating to a contract by a son, then the plaintiff sues the son, he will be met by a defense if he sues the father on his promise, and, on the other hand, the position will be the same if the son promises and the plaintiff sues the father on the *peculium.*

6 GAIUS, *XII Tables, book 1:* If one who gave a guarantor did not appear because he was away on the business of the state, it is not equitable that the guarantor should be bound to appear on another's account when he himself was free not to appear.

7 PAUL, *Edict, book 69:* If anyone promises that a slave or someone in another's power will appear in court, he has the same defenses as if he had given a guarantee for a free person or a head of a household, unless the slave is said to have departed on state business; for a slave cannot depart on state business. But the other defenses, apart from this, being common, are available equally in the case of free man and slave.

8 GAIUS, *Provincial Edict, book 29:* And if three or five or several days after that on which the defendant promised to appear he should make it possible for the plaintiff to

sue him and the latter's right is not made worse by the delay, it follows that a defense ought to be available to him.

9 ULPIAN, *Edict, book 77:* If a slave promises that he will appear in court, neither he nor his guarantors can be sued on the stipulation. 1. If a promise to appear in court is made in the name of several slaves, Labeo says that the whole penalty is certainly due where one has not appeared, because it is true that all have not appeared. But if the amount due in respect of one is offered as penalty, he says that the person sued on this stipulation may employ the defense of fraud.

10 PLAUTIUS, *book 1:* If I promised that someone, alleged to be free from liability through lapse of time, will appear in court, an action is granted compelling me either to produce him or to defend the action against him so that the correct state of affairs may be determined. 1. A slave, the subject of a promise to appear, dies before the due day through the malice of the promisor. We adopt the undisputed rule that the penalty cannot be sought before the day has arrived. For the whole stipulation is held to refer to that day. 2. A person about to bring the action for insult took a stipulation that his adversary appear in court. After the stipulation became operative, the promisee died before joinder of issue. It is settled that an action on the stipulation is not available to his heir because such stipulations are given with reference to the subject matter of the action and the action for insult is not available to the heir. For although the stipulation made to secure appearance in court passes to the heir, yet it is not given in this case. For should the deceased have abandoned the action for insult and wished to sue on the stipulation, he would not have been allowed to do so. And the same is to be said if a person against whom I wish to bring the action for insult has died and such a stipulation has become operative. For the action on the stipulation is not available to me against his heir, and so Julian writes. On this view, even if guarantors are given, an action will not be granted against them on the death of the defendant. Pomponius says the same, provided that he did not die after a long period of time since, if he had come to court, the plaintiff would have been able to join issue with him.

11 ULPIAN, *Sabinus, book 47:* If anyone promises that a certain person will appear in court, he ought to cause him to appear in the same legal position. But to cause to appear in the same legal position is to cause to appear in such a way that the plaintiff's prosecution of his case is not made worse, although the obtaining of redress could be more difficult. For although redress is more difficult, yet it is to be said that the promisor is held to have caused him to appear in the same legal position. For if he contracted a new debt or lost money, still the promisor is held to have caused him to appear in the same legal position. Therefore, even one who is produced after he has become a judgment debtor to someone else is held to appear in the same legal position.

12 PAUL, *Sabinus, book 11:* But one who asserts some new special right is not held to appear in the same legal position. 1. The rule is to be followed which refers the calculation of the plaintiff's interest to the time at which he ought to appear, not to the time at which the hearing commences, even though he should have ceased to have an interest [by the latter time].

13 JULIAN, *Digest, book 55:* Whenever a slave intending to litigate himself, in order to secure appearance in court, either takes a stipulation from another or makes a promise himself, neither does the stipulation become operative nor are the guarantors liable, because the slave cannot be sued or sue.

14 NERATIUS, *Parchments, book 2:* If a procurator takes a stipulation to the effect that the promisor will only cause someone to appear but does not stipulate for a penalty if he should not appear, that stipulation is virtually of no account because the procurator, in respect to his own advantage, has no interest that the person in question should appear. But since he has acted on another's business in stipulating, it can be urged by way of defense that the advantage to be looked at in that affair is not the procurator's but the person's on whose account he acted. On this line of reasoning, where the defendant has not appeared, as much is due to the procurator under that stipulation as is the amount of his principal's interest that he should appear. Moreover, the position can be said even more strongly to be the same if the procurator stipulates in this form, "for how much the affair will amount to," provided that we interpret this form of words as relating not to the advantage of the procurator but to that of the principal.

15 PAPINIAN, *Questions, book 2:* If a tutor promises that he will appear in court and does not observe the stipulation and, in the meantime, the *pupillus* attains maturity or dies or even has been made to renounce the inheritance, an action on the stipulation will be refused. For even if judgment has been given against the tutor in respect of the subject matter of the action and any of these events should happen, it is an established rule that the action on the judgment will not be allowed against him.

12

HOLIDAYS, ADJOURNMENTS, AND VARIOUS OTHER TIMES

1 ULPIAN, *All Seats of Judgment, book 4:* It is provided in the speech of the deified Marcus that no one may compel his adversary to come to court at harvest or vintage time, because persons occupied in agricultural matters are not to be compelled to come to court. 1. But where the praetor through ignorance or carelessness insists on summoning them and they appear voluntarily, if he should pronounce sentence when the litigants are present voluntarily, the sentence will be valid, even though the magistrate who had summoned them had not acted properly. But if, although they had remained absent all the time, he pronounces sentence in their absence, it is logical to say that the sentence will be of no force (for it is not proper that the act of the praetor derogate from the law) and without recourse to appeal the sentence will therefore be void. 2. But certain cases constitute exceptions in which we can be compelled to appear before the praetor even at harvest and vintage time; of course, this is where the subject matter of the action is about to be lost through lapse of time, that is, if delay will destroy the action. Indeed, whenever the matter is urgent, we are to be compelled to appear before the praetor, but it is equitable that compulsion lies only to effect joinder of issue, and this is expressed in the very words of the speech. Finally, where one of the two parties refuses to litigate after joinder of issue, the speech allows an adjournment.

2 ULPIAN, *Edict, book 5:* The deified Marcus, in the same speech delivered in the senate, provided that in some matters the praetor might be approached even on holidays, for example, so that tutors or curators may be appointed, so that those failing to carry out their duties may be warned, that excuses may be brought forward, that maintenance may be established, that ages may be investigated, and that *missio in possessionem* may be granted on account of unborn children, the keeping of property safe, legacies or *fideicommissa* or threatened damage; and likewise that wills may be produced, that a curator may be appointed for the goods of a person, where the existence of an heir is uncertain, or for grants of maintenance to children, parents, and patrons, or in connection with entry on an inheritance thought to be insolvent, or so that an

inspection may be held to determine the extent of a serious injury or so that freedom established under a *fideicommissum* be made effective.

3 ULPIAN, *Edict, book 2:* It is usual, even at harvest and vintage time, that justice be administered with respect to matters in which rights are about to be destroyed through lapse of time or death. Examples in which rights are destroyed by death are theft, damage to property, serious injury, cases in which persons are said to have robbed, when there has been a fire, collapse of a house, shipwreck, or the capture of a boat or ship, and similar cases. The same obtains if the subject matter of an action is about to be lost through lapse of time or the time within which the action is to be brought has nearly gone. 1. Cases pertaining to the establishment of freedom are heard and determined at any time. 2. Likewise, justice is administered at any time with respect to one who, contrary to the public good, traffics in prohibited goods.

4 PAUL, *Edict, book 1:* The governors of provinces, in accordance with the custom of each place, generally establish the days on which the crops and grapes are to be gathered.

5 ULPIAN, *Edict, book 62:* On the last day of December, magistrates have been accustomed neither to administer justice nor to exercise any of their powers.

6 ULPIAN, *Edict, book 77:* With respect to judgment given on a holiday, it is provided by law that there should be no hearing on those days except with the consent of the parties and further that if judgment has been given contrary to this provision, no one is under a duty to comply with it or pay what is due under it, and no one whose jurisdiction is invoked on the matter may compel compliance with the judgment.

7 ULPIAN, *Duties of Consul, book 1:* Moreover, the speech of the deified Marcus states that a delay for the production of documents is not to be granted more than once. But on account of the convenience of litigants, for cause shown, it is customary to allow a further delay, whether the documents are in the same or another province, according to the rules prevailing in the place in which they are, and this is especially so if something unexpected emerges. If a deceased person has been granted some delay in the production of documents, it is to be seen whether this ought also to be allowed to his successor or, indeed, whether a further delay cannot be given because of that already granted. And the better opinion is that even this should be granted on cause being shown.

8 PAUL, *Sabinus, book 13:* By Roman custom, a day begins at midnight and ends in the middle of the succeeding night. And so whatever is done in these twenty-four hours, that is, in two half nights with the intervening daylight, is done just as if it were done at any hour of the daylight.

9 ULPIAN, *Duties of Proconsul, book 7:* The deified Trajan issued a rescript to Minicius Natalis to the effect that holidays gave a vacation from legal business only; but business pertaining to military discipline was to be transacted even on holidays. Included here is examination of prisoners.

10 PAUL, *Views, book 5:* In all monetary cases, adjournment for each case cannot be granted more than once. But in capital cases three adjournments can be granted the defendant and two the prosecutor, in both cases, on cause being shown.

13

FORMAL PRONOUNCEMENTS

1 ULPIAN, *Edict, book 4:* Where anyone wishes to bring an action, he should give notice; for it seems most fair that one who is about to bring an action should give notice so that the defendant accordingly may know whether he ought to admit the claim or contest it further and so that if he thinks it should be contested, he may come

prepared for the suit, knowing the action by which he is sued. 1. To give notice includes providing a means for taking a copy, the drawing up and furnishing of a written statement or dictation. Labeo says that a person also gives notice if he brings his adversary to the tablets proclaiming the edict and points out the action which he is about to dictate or declares the one which he intends to use. 2. Announcements should be made without specification of day and consul; this is to prevent a contrivance by which an announcement bearing day and consul is made and then something is done prior to that date. Moreover, the praetor refers to the day on which and the consul under whom an instrument has been executed and not to the date at which it determines payment to be made. For the day of payment is almost the most important part of a stipulation. Yet accounts ought to be produced bearing day and consul since otherwise, without a statement of the day and consul, it could not appear what had been received and expended. 3. A person ought to produce everything which he intends to produce before the judge. Yet he is not compelled to produce documents which he does not intend to use. 4. One who does not produce the whole stipulation is held not to produce. 5. Relief is granted to those who have not produced through error or on account of age or want of education or sex or any other lawful reason.

2 PAUL, *Edict, book 3:* If a legacy is sought, the praetor does not order production of the words of the will. Perhaps the reason is that the heirs usually have a copy of the will.

3 MAURICIANUS, *Penalties, book 2:* The senate has expressed the opinion that any person from whom something is sought by the imperial treasury should not be compelled to disclose to the informer documents other than those which pertain to the case about which he has declared that he has given information.

4 ULPIAN, *Edict, book 4:* The praetor says: "Let those who operate a banking business produce accounts in matters relating to their business with the day and consul added." 1. The reason for this edict is most equitable. For since bankers prepare the accounts of individuals, it was equitable that what he prepared on my account and the [relevant] documents, which in a certain measure can be deemed to be mine, be produced to me. 2. Again, these words are understood to comprise a son-in-power so that even such a person is compelled to produce; it is a question whether his father also is. Labeo writes that the father is not to be compelled unless the banking business is operated with his knowledge. But Sabinus rightly replies that this is to be allowed in the case where profit reverts to the father. 3. But where a slave sets up as banker (for he can), certainly if he does this with his master's consent, the latter is to be compelled to produce and an action is given against him just as if he had set up himself. But if the slave acted without his master's knowledge, it is sufficient for the latter to swear that he did not have the accounts in question. If a slave sets up as banker with his *peculium*, the master is liable under the action on the *peculium* and for benefit taken. But if the master has the accounts and does not produce them, he is liable for the whole. 4. Even one who has ceased to act as banker is compelled to produce. 5. But he is compelled to produce at the place where he carried on the banking business, and this has been clearly settled. But if he has the documents of the bank in one province, although he has carried on business in another, I think he can be compelled to produce [them] in the place where he carried on business. For in the first instance he erred in transferring the documents elsewhere. But if he carries on business in one place and is asked to produce elsewhere, this he is by no means compelled to do, unless you wish him to give you copies in the place where the action is brought, of course, at your expense.

5 PAUL, *Edict, book 3:* And an interval will be granted so that they can be brought.

6 ULPIAN, *Edict, book 4:* If any banker, as is often the case, has a document in his house or warehouse, he should either bring you to the place or supply you with a copy. 1. The successors of a banker are compelled to produce accounts. But if there are several heirs and the accounts are in the possession of one, he alone is compelled to produce. But if all have them and one has produced, all may be compelled to produce. For what if the one who has produced is of low and deplorable condition so that one can deservedly doubt the good faith of the production? Therefore, to make possible a comparison of the accounts, the others also ought to produce or at least sign those produced by the one. The rule will be the same if there be several bankers from whom production is sought. For if several tutors together have administered the guardianship, all ought either to produce or to sign what is produced by one. 2. But the adversary of a banker is required to swear an oath that he is not seeking production in order to make a false accusation, lest perhaps he should demand either unnecessary accounts or ones which he [already] has, for the purpose of harassing the banker. 3. Moreover, Labeo says an account is a transaction involving two aspects, giving and receiving, credit and debit, incurring and discharging an obligation on one's own account. Nor does any account [he says] begin with the bare payment of what is owed. If someone has accepted a pledge or a mandate, he is not compelled to disclose this fact since it has nothing to do with the accounts. But where a banker has agreed to pay a debt, he ought to disclose the fact, since this pertains to the banking business. 4. An action lies in accordance with this edict to the extent of a person's interest. 5. From which, it appears that this edict applies only where the account concerns the person in question. However, an account is held to concern me, provided that you have dealt with it on my mandate. But if my procurator in my absence has given a mandate, is production to be made to me on the ground that it concerns me? And the better opinion is that production should be made. Also I do not doubt that an account which anyone has with me should also be produced to my procurator on the ground that it concerns him, and he should give the *cautio de rato* if no mandate has been given to him. 6. If the beginning of an account book has the date on which Titius's account has been drawn up and then my account follows without day and consul, the day and consul are also to be produced for me. For the mention of the day and consul at the beginning is common to the whole account book. 7. Moreover, to produce is either to dictate or hand over a written statement or make available an account book. 8. The praetor says: "On cause being shown, I will order production to be made to a banker or to one who makes a further demand for production." 9. The praetor forbids production being made to a banker because it is also possible for the latter to inform himself from the documents he has in virtue of his occupation. And it is absurd, seeing that he is himself in the legal position of being under a duty to produce, for him to ask that production be made to him. It must be seen whether accounts should not be produced to the heir of a banker. And if, indeed, the documents of the banking business are in his possession, production ought not to be made to him; if not, production should be made, on cause being shown. For an account is to be produced to the banker himself on cause being shown, that is, if he shows that accounts have been lost through shipwreck or collapse of a house or fire or some similar chance or that they are in a far away place, for example, across the sea. 10. The praetor orders that production should not be made to one who makes a second request [for the same material] except on cause being shown,

7 PAUL, *Edict, book 3:* as, for example, where he shows that he has left abroad what was first produced or a full production has not been made or the accounts [produced] were lost by an unavoidable accident not by carelessness. For if he loses them by the sort of accident for which he can be excused, [the praetor] will order production to be made afresh. 1. This word "again" signifies two things: in the first place, it means a second time, which the Greeks call "a second time," and in the second, it refers also to the succeeding period of time which is called in Greek "again," and is understood as

"whenever there is need." For it can happen that someone loses an account which has twice been produced for him; so the word "again" is understood as "often."

8 ULPIAN, *Edict, book 4:* When a banker is asked to produce accounts, he is punished if, intentionally, he does not produce [them], but he will not be accountable for fault unless it approximates to guilty intention. Moreover, he intentionally does not produce both where he has produced with some malicious purpose and where he has not produced at all. 1. Further, one who infringes this edict ought to pay compensation to the extent of my interest that the accounts be produced at the time when the decree of the praetor was obtained, not to the extent of my interest today. And so, although I cease to have an interest or my interest lessens or decreases, my action will nevertheless exist and will take account of neither the increase nor the decrease.

9 PAUL, *Edict, book 3:* Certain persons are under a duty to produce accounts for us, and yet they are not compelled by the praetor by means of this edict. For example, when a procurator has administered our affairs or accounts, he is not compelled by the praetor through fear of an *actio in factum* to produce accounts. Of course, the reason is that we can obtain them through the action on the mandate. And when a partner has carried out transactions fraudulently, the praetor does not intervene by means of this clause, since there is the action on the partnership. Nor does the praetor compel the tutor to produce accounts to a *pupillus*. But he is normally compelled to produce by the action arising from the guardianship. 1. It does not matter if the successors or the father or master of the banker were of the same profession or not, because, since they succeed to the place and legal position of the banker, they ought to perform his functions. However, a person to whom the banker has bequeathed his accounts is not held to be included because these words signify his legal successor. A legatee is no more included than he would be if the banker, when alive, had given him the accounts. Again, the heir will not be liable where he neither possesses nor has fraudulently contrived to lose possession. But if, before passing them over to the legatee, he was officially told not to pass them over in the meantime, he will be liable as if he had acted fraudulently. Likewise, he will be liable before he passes them over. But if the heir has not acted fraudulently, the legatee, on cause being shown, can be compelled to produce. 2. Pomponius writes that it is not unfair that moneychangers also are compelled to produce accounts both because these money changers, just as bankers, make up accounts and because they receive money and pay it out so much at a time, and the proof of this, in particular, is contained in documents and ledgers. And very often recourse is had to their good faith. 3. Moreover, the praetor orders production of accounts which concern them to be made to all who request it and swear that they do not make the request in order to bring a false accusation. 4. For an account concerns us not only where we ourselves have engaged in a transaction or succeeded to one who has but also where one in our power has done so.

10 GAIUS, *Provincial Edict, book 1:* A banker is ordered to produce accounts. Nor does it matter whether the dispute is with the banker himself or with another. 1. But the reason the praetor compels bankers only and not others engaged in a different business to produce accounts is that the functions and duties of the former are exercised in the interests of the public and their principal task is to complete carefully accounts of what they have done. 2. However, an account is understood to be produced only if it is produced from its starting point; for an account cannot be intelligible unless it is examined from its starting point. Of course, this does not mean that each person has the power to inspect and copy the whole of the account book and all its pages but that only that part of the accounts which it concerns a particular person to know may be inspected and copied. 3. Since, however, the action lies to the extent of the plaintiff's interest that the accounts be produced to him, it follows that, whether he has been condemned or has not obtained what he claimed because he did not have the accounts from which he could make out his case, whatever he has lost in this way may be

recovered by this action. But let us see whether this is workable. For if he can prove before the judge who hears the case between him and the banker that he would have been able to succeed if he had had the accounts in the action in which he was defeated, he could have made his proof at that time [without them]; and if he has failed to do this or the judge has paid no attention to his proof, he has himself or the judge to blame. But this argument is not compelling. For it can happen that now, having obtained accounts either through production by the banker himself or in some other way or with other documents or witnesses which for some reason he could not use at the earlier time, he can prove that he could have succeeded. For it is for this reason that a *condictio* and the action for damage to property lie in respect of a *cautio* which has been stolen or obliterated, because, where we could not previously prove a case through the theft of a *cautio* and consequently have lost it, we can later prove the case by other documents or witnesses which we were unable to use at the earlier time.

11 MODESTINUS, *Rules, book 3:* It is accepted law that copies of documents can be produced even without the signature of the person producing.

12 CALLISTRATUS, *Monitory Edict, book 1:* Women are held to be excluded from the office of banker since this is a masculine type of work.

13 ULPIAN, *Edict, book 4:* This action will not be granted after a year nor against the heir except in respect of his own act. But it will be granted to the heir.

14

PACTS

1 ULPIAN, *Edict, book 4:* There is a natural equity in this edict. For what so accords with human faith as that which men have decided among themselves to observe? 1. Moreover, pact is derived from agreement (the word peace comes from the same origin). 2. And agreement is the agreement and consent of two or more persons about the same thing. 3. There is a general word "agreement" relating to everything agreed upon by those who make some contract or settlement with each other; for just as those who are collected and come from different places into one place are said to come together, so those who, from different motions of the mind, agree on one thing, that is form one opinion [can be said to come together]. Moreover, so true is it that the word "agreement" has a general significance that Pedius neatly says that there is no contract, no obligation which does not consist of agreement, whether it is achieved by the handing over of something or by the use of certain words. For a stipulation, which is made by the use of certain words, is void unless there is agreement. 4. But most agreements are called by some other name, for example, sale, hire, pledge, or stipulation.

2 PAUL, *Edict, book 3:* Labeo says that we can agree either by handing something over or by means of a letter or messenger when we are absent. But there is also understood to be agreement by implication. 1. And, therefore, if I return a *cautio* to my debtor, we are held to have agreed that I will not sue and it has been settled that a defense based on the agreement will be available to him.

3 MODESTINUS, *Rules, book 3:* Indeed, after a pledge has in fact been returned to the debtor, if the money has not been paid, there is no doubt that what is owed can be claimed unless there is proved a specific intention to the contrary.

4 PAUL, *Edict, book 3:* Likewise, on the ground that even agreements by implication are valid, it is settled that in the letting of urban dwellings, the movables [of the tenant] are constituted a pledge for the landlord even though nothing is expressly

agreed. 1. According to this even a mute can make a pact. 2. A stipulation promising a dowry also bears out this point; for before the marriage no claim can properly be made, just as if this had been explicitly stated, and if the marriage does not take place, the stipulation automatically becomes void. Julian comes to the same decision. 3. The same jurist, consulted about the position where the parties had agreed that the principal was not recoverable so long as interest was paid but framed the stipulation unconditionally, replied that the condition was incorporated in the stipulation, just as if it had been expressly stated.

5 ULPIAN, *Edict, book 4:* There are three kinds of agreement. For they are made either on a public or a private ground, and a private agreement takes effect either under civil or universal law. A public agreement is one made to conclude a peace and occurs whenever leaders in war have agreed on particular terms.

6 PAUL, *Edict, book 3:* A civil law agreement is one which is given force by some statute. And hence, at times, an action arises from a pact or is extinguished by one, whenever relief is afforded by a statute or a decree of the senate.

7 ULPIAN, *Edict, book 4:* By universal law some agreements give rise to actions, some to defenses. 1. Those which give rise to actions do not have a name of their own but take the proper name of the contract [to which they refer], such as sale, hire, partnership, loan, deposit, and other similar contracts. 2. But even if the matter does not fall under the head of another contract and yet a ground exists, Aristo in an apt reply to Celsus states that there is an obligation. Where, for example, I gave a thing to you so that you may give another to me, or I gave so that you may do something, this is, Aristo says, a *synallagma* and hence a civil obligation arises. And, therefore, I think that Julian was rightly reproved by Mauricianus in the following case. I gave Stichus to you so that you would manumit Pamphilus; you have manumitted; Stichus is then acquired by a third party with a better title. Julian writes that an *actio in factum* is to be given by the praetor. But Mauricianus says that a civil action for an uncertain amount, that is, *praescriptis verbis*, is available. For the contract described by Aristo with the word *synallagma* has been made and hence this action arises. 3. If a promise is made to induce someone not to commit an unlawful act, no obligation arises from this agreement. 4. But, when no ground exists, it is settled that no obligation arises from the agreement. Therefore, a naked agreement gives rise not to an obligation but to a defense. 5. However, at times, it gives rise to an action, as in the case of good faith actions. For we generally say that agreements by way of pact are incorporated in good faith actions. But this is understood to mean that only if the pacts have followed immediately upon [the main contract] are they incorporated in the plaintiff's action; if concluded after an interval, they are not incorporated, nor will they avail the plaintiff, should he sue, since an action cannot arise from a pact. For example, an agreement is made after a divorce that the dowry should be returned immediately, not at the end of the period of time appointed for its return. This will not be effective since an action cannot arise from a pact. Marcellus writes that the same applies in a case where an agreement has been made, with respect to the action arising from guardianship, that a greater amount of interest than that laid down should be paid; the action will not lie since an action cannot arise from a pact. For the pacts incorporated are those which supply a contract with its terms, that is, those agreed when the contract was originally made. I know that the same reply was given by Papinian who held further that where some agreement was reached after an interval following upon a sale that fell outside the nature of the contract, it would not found an action on the purchase because of this very rule that an action may not spring from a pact. And the same must be said to apply in the case of all good faith actions. But the defendant will be able to rely on the pact because such pacts which are concluded afterward generally function as defenses. 6. In the case of good faith actions, so true is it that pacts made subsequently which relate to a particular contract are included in it, that it is settled in sale and the other good faith actions, providing nothing has yet been done, that the

sale may be rescinded. If, therefore, this is possible with respect to the whole contract, why cannot part alone be changed by a pact? And Pomponius, in his sixth book on the edict, writes that this is the case. Since this is so, for the same reason even the plaintiff will be able to rely on a pact with the result that it will yield an action, provided that nothing has yet been done. For if the whole contract can be rescinded, why can it not also be amended? In short, it appears in a certain way as though a new contract has been made. This is a subtle approach. For this reason, equally I do not reject what Pomponius affirms in his book of readings that, by a pact, one can withdraw in part from a sale, the effect being as though the sale as to part has been made afresh. But when a [deceased] buyer has two heirs and the seller concludes a pact with one that the sale be resiled from, Julian says that the pact is valid and that the sale is dissolved in part; for also, in any other contract, by a pact, any heir could secure himself a defense. And so the decisions both of Julian and Pomponius are correct. 7. The praetor says: "I will enforce agreements in the form of a pact which have been made neither maliciously nor in contravention of a statute, plebiscite, decree of the senate or edict of the emperor, nor as a fraud on any of these." 8. Some pacts are *in rem*, some *in personam*. They are *in rem* whenever I agree generally that I will not sue, *in personam* whenever I agree that I will not sue a particular person, that is, that I will not sue Lucius Titius. But whether a pact has been concluded *in rem* or *in personam* is to be gathered not less from the words than from the intention of the parties. For generally, as Pedius says, a person is inserted in a pact not to make it personal but to show with whom the pact has been made. 9. The praetor says that he will not enforce a pact made with malice. Malice occurs where there is craftiness and deceit. And, as Pedius says, a pact is made with malice whenever one thing is intended for the purpose of cheating another and there is a pretense that something else is intended. 10. But the praetor adds nothing for the case in which a pact is said to have been made for the purpose of defrauding. But Labeo aptly says that this is either unfair or useless. It is unfair if a creditor who has once in good faith released his debtor [by pact] attempts later to retract, useless, if he was deceived when he made the release; for fraud is also included in malice. 11. But whether a pact has been concluded with malice from the beginning or whether something has been done with malice after its conclusion, a defense will be relevant on account of the words of the edict, "nor let anything be done. . . ." 12. The words "Titius asked, Maevius promised," which are usually inserted in the final part of a pact, are understood to express not only an agreement but also a stipulation, and therefore the action on stipulation arises unless the contrary is specifically shown, namely that this was done with the intention not of stipulating but only of concluding a pact. 13. If I make a pact that no action will be brought in respect of a judgment or of a house which has been burnt, this pact is valid. 14. If I make a pact that I will not obtain an order prohibiting a new construction (*operis novi nuntiatio*), some think that this agreement is not valid on the ground that the *imperium* of the praetor is involved. But Labeo draws the following distinction. If the order prohibiting a new construction relates to private affairs, the agreement is lawful; if to public affairs, it is not. This distinction is correct. And, therefore, in respect of all other matters relating to the edict of the praetor which do not harm

the public but relate to private affairs, a pact is lawful. For the statute [*Twelve Tables*] permits a pact to be made about theft. 15. Again, if anyone makes a pact not to bring the action on deposit, according to Pomponius, the pact is valid. Likewise, if anyone makes a pact that in a contract arising from deposit all risk is to be borne [by the depositee], Pomponius says the pact is valid nor is it to be disregarded on the ground that it is not made in accordance with the law. 16. And generally whenever a pact has deviated from common law, it should not be enforced. And Marcellus, in the second book of his *Digest*, writes that neither a legacy nor an oath not to sue [where there is deviation from common law] is to be enforced. And if a stipulation is made about matters in respect of which a pact is unlawful, it is not to be enforced but in all cases to be void. 17. If, before entering upon an inheritance, the person [instituted heir] makes a pact with the creditors that less [than is due to them] be paid, the pact is valid. 18. But if such a person is a slave who makes the pact before he acquires freedom and the inheritance, because he was instituted heir under a condition, Vindius writes that the pact will be ineffective. But Marcellus in the eighteenth book of his digest thinks that a *suus heres* and a slave required to be heir (*necessarius servus*), where they have been instituted unconditionally and made a pact before intervening in the inheritance, may properly make the pact; and this is correct. And the same will apply in the case of the *heres extraneus*. If he enters, acting on the mandate of the creditors, Marcellus thinks that he also has the action on the mandate. But if any one, as we have mentioned above, has made a pact as a slave, Marcellus denies [its validity] since generally what he has done as a slave does not benefit him after he has become free. This is to be accepted in respect of the defense of pact. But the question arises whether the defense of fraud is available. Marcellus, in similar cases, although previously he had doubted, nevertheless allows it, as, for example, where a son-in-power instituted heir makes a pact with the creditors [that they should take less] and, having been emancipated, enters on the inheritance. And he says that the son can use the defense of fraud. He asserts the same if the son in his father's lifetime makes a pact with the latter's creditors, for here the defense of fraud will avail him. Indeed, even in the case of the slave, the defense of fraud is available. 19. Today, however, an agreement of this kind will prejudice the creditors only if they have unanimously agreed and by common consent declared what proportion of the debts they will accept. However, if they disagree, then the intervention of the praetor is necessary and he in his decree follows the will of the majority.

8 PAPINIAN, *Replies, book 10:* It is settled that the majority is determined by reference to the amount owed, not to the number of persons. But if they are all owed the same, then the numerical majority of the creditors is to be followed. Where the creditors are evenly divided, the praetor follows the authority of the one who is preeminent in worth. If there is complete equality in all respects, the more humane opinion is to be chosen by the praetor. For this can be gathered from the rescript of the deified Marcus.

9 PAUL, *Edict, book 62:* If several persons have the same action, they are held to count as one person. For example, where there are several promisees under a stipulation or several bankers to whom someone has incurred debts at the same time, they are counted as one because there is one debt. And when several tutors of a creditor *pupillus* have made an agreement, they are counted as one because they have agreed in the name of one *pupillus*. And also if one tutor makes an agreement in the name of several *pupilli* laying claim to one debt, it is settled that he counts as one since it is difficult for one man to undertake the role of two. For a person who has several actions as against one who has one action is not understood to count as several persons.

1. We estimate the total of a debt by reference to several sums, as, for example, where small sums totaling one hundred aurei are owed to one person but a sum of fifty aurei to another; for in this case we look at several sums because, added together, they exceed [the other debt]. 2. Moreover, we ought also to include interest in the calculation of a sum.

10 ULPIAN, *Edict, book 4:* However, the rescript of the deified Marcus speaks as if all creditors ought to agree. What is the position if some are absent? Should those absent accept what has been done by those present? But it is a nice point whether this agreement prejudices preferred creditors who are absent, provided that the pact in any case binds those who are absent. And I recall that before the procedure laid down by the deified Marcus, the deified Pius enacted that the imperial treasury, even in those cases in which it did not have a *hypothec*, and other preferred creditors ought to accept what had been done by the creditors [present]. For all these provisions are to be observed in the case of such creditors as do not have *hypothecs*. 1. If there is a stipulation for a penalty added to a pact, the question arises whether the defense of pact is relevant or the action on the stipulation. Sabinus thinks, and this is correct, that the promisee has the choice of adopting either course. If, however, he uses the defense of pact, it is fair that he formally release the stipulation. 2. Generally, we are accustomed to say that the defense of fraud supplements the defense of pact. And finally, Julian writes that some people who cannot use the defense of pact will be able to use the defense of fraud and most others agree. For example, if my procurator makes a pact, the defense of fraud will be available to me, as Trebatius held, asserting that just as a pact made by my procurator will prejudice me so it will also benefit me,

11 PAUL, *Edict, book 3:* because payment can validly be made to him.

12 ULPIAN, *Edict, book 4:* For it is settled that the pact operates as a bar, whether I gave him a mandate to make it or he was procurator for all my affairs, and so Puteolanus writes in the first book of his *Assessoria*, since it is settled that he can even bring the action to joinder of issue.

13 PAUL, *Edict, book 3:* But if a procurator is appointed only for the purpose of an action, the agreement made does not prejudice his principal because payment cannot validly be made to him. 1. But if a procurator is appointed to act on his own behalf, he is held to have the place of principal, and therefore the pact will have to be kept.

14 ULPIAN, *Edict, book 4:* Likewise, it is decided that a pact made by the manager of a business association operates both to the benefit and the detriment of the association.

15 PAUL, *Edict, book 3:* Also, as Julian writes, a pact made by a tutor benefits his *pupillus*.

16 ULPIAN, *Edict, book 4:* If a pact is concluded [by a debtor] with the buyer of an inheritance and the seller of the inheritance sues [the debtor], the defense of fraud operates as a bar. For from the time of a rescript of the deified Pius providing that *utiles actiones* be given to the buyer of the inheritance, a debtor of the inheritance can properly use the defense of fraud against the seller. 1. Again, if an agreement is made between the owner of an object and the buyer that a slave who has been bought should be returned, the defense of fraud will operate as a bar to an action for the price brought by the person who sold the object on behalf of the owner.

17 PAUL, *Edict, book 3:* If I give ten to you and make a pact that twenty are owed to me, no obligation beyond the ten arises. For an obligation cannot be contracted by the handing over of anything, except insofar as it has been handed over. 1. Some actions are extinguished through a pact by operation of law, as the actions for insult and theft. 2. As to pledge, by the praetorian law (*ius honorarium*), an action arises from a pact but is barred whenever I make a pact not to sue. 3. If anyone makes a pact

that no claim will be made against him, but will be made against his heir, the defense will not benefit the heir. 4. If I have made a pact that no claim will be made against me or Titius, it will not benefit Titius even if he becomes my heir, because it cannot be made valid by a subsequent event. Julian lays this down in the case of a father who had made a pact that no claim should lie against himself or his daughter, when the daughter became her father's heir. 5. A pact made with the seller, if framed *in rem*, in the opinion of many, also benefits the buyer, and Pomponius writes that we adopt this rule. But, in the opinion of Sabinus, even if framed *in personam*, it is valid in respect to the buyer. Moreover, he thinks the position is the same even if succession to the property is made by gift. 6. When a possessor of another's inheritance has made a pact, most think that this will neither prejudice nor benefit the heir if he should recover possession of the inheritance. 7. If a son or slave makes a pact that no claim be made against the father or master,

18 GAIUS, *Provincial Edict, book 1:* whether they make a pact in relation to their own contract or the contract of the father or master,

19 PAUL, *Edict, book 3:* they [the son and slave] acquire the defense. The same applies in the case of those who, in good faith, are in a state of servitude to another. Likewise, if a son-in-power has made a pact that no claim will lie against him, it will benefit him and his father also, if he is sued by the action on the *peculium*,

20 GAIUS, *Provincial Edict, book 1:* or for money turned to account or if he be sued as if he were the defender of his son, if this is what he preferred to do

21 PAULUS, *Edict, book 3:* and the father's heir in the lifetime of the son [will also benefit]. But after the death of the son [the pact will benefit] neither the father nor his heir, because it was *in personam*. 1. But if a slave made a pact that a claim should not be brought against him, the pact will not as such be enforceable. Let us consider the defense of fraud. If the pact operates *in rem*, the defense of pact will benefit the master and his heir. But if the pact is conceived *in personam*, then the defense of fraud alone is available to the master. 2. However, we cannot benefit those in our power by making a pact. But Proculus says that the pact will benefit us if we are sued in their name. This is correct, if such was the intention in making the pact. But if I make a pact that you do not sue Titius and then you bring an action against me in his name, the defense of pact is not to be allowed. For a pact unavailable to a person himself does not avail his defender. Julian also writes, if a father has made a pact that neither he nor his son is to be sued, the better opinion is that the defense of pact is not granted to the son-in-power but that the defense of fraud benefits him. 3. A daughter-in-power can make a pact that she will not sue for the dowry when she becomes independent. 4. Likewise, a son-in-power may validly make a pact about what has been bequeathed to him as a legacy under a condition. 5. In a case where creditors jointly have a claim to the same debt or debtors jointly owe the same debt, the question arises how far the defense of pact also benefits or prejudices a creditor or debtor other than the one who made the pact. And pacts *in rem* benefit any debtor where it was in the interest of the person making the pact that that debtor's obligation be discharged. And so the agreement of a debtor [that he will not be sued] will avail his guarantors,

22 ULPIAN, *Edict, book 4:* unless the intention was that only the debtor should not be sued, but that his guarantor should be; for then the guarantor cannot use the defense.

23 PAUL, *Edict, book 3:* But the agreement of a guarantor will not benefit the principal debtor, because he has no interest that the money should not be sought from the debtor. Indeed, it will not even benefit his co-guarantors. For it is not any sort of interest that enables a defendant to benefit from a pact made [by the plaintiff] with another; he benefits only when, through the defense being granted to him, the main

benefit of the pact goes to the person who made it, as in the case of a principal promisor and those who are liable on his behalf.

24 PAUL, *Plautius, book 3:* But if a guarantor promised on his own account, in this case, the guarantor is to be treated as principal debtor, and a pact made with him is held to have been made with a principal.

25 PAUL, *Edict, book 3:* The same applies in the case of two principal promisors and two bankers, provided in both cases that they are partners. 1. Labeo says that a personal pact does not concern a third person, just as it does not concern the heir [of a party]. 2. But although the pact of a guarantor does not benefit the principal debtor, Julian writes that generally the defense of fraud will benefit the debtor,

26 ULPIAN, *Edict, book 4:* of course, if the intention was also that no claim be brought against the debtor. The same applies in the case of co-guarantors.

27 PAUL, *Edict, book 3:* If one of the partners in a banking business made a pact with a debtor, does the defense also prejudice the other partner? Neratius, Atilicinus, and Proculus say that not even if the pact is *in rem* will it prejudice the other; for the only established rule is that the other can seek the whole. Labeo says the same, since one [of such partners] cannot novate the obligation, although payment is validly made to him. For repayment of what they have lent is validly made to those in power, although they cannot novate. This is correct. And the same is to be said in the case of two promisees under a stipulation. 1. If a pact [not to sue] has been made with the principal debtor for a certain time, beyond that time it benefits neither debtor nor guarantor. But if, without mentioning himself, the debtor has made a pact that the guarantor should not be sued, some think that the guarantor will derive no benefit, although it is in the interest of the debtor. The reason is that he should have available only a defense which is also available to the debtor. I have always understood that the defense benefits the guarantor. For it is not a case in which the guarantor acquires a right through a free person but one in which provision is made for the interests of the person who made the pact, and this is the rule we adopt. 2. Having made a pact that he would not sue, someone afterward agrees that he will sue. The earlier pact is destroyed by the later, not, indeed, by operation of law as a stipulation, if this is the intention, is extinguished by a stipulation, because stipulations involve questions of law whereas pacts are matters of fact. And, therefore, the defense [furnished by the earlier pact] is rebutted by a rejoinder. For the same reason the position is that the prior pact does not benefit guarantors. But if the pact was such that it also extinguished an action, for example, the action for insult, the plaintiff cannot acquire an action by subsequently making a pact that he can sue, because the first action is extinguished and the later pact cannot effectively provide an action. For the action for insult arises not from a pact but from an insult. We say the same in the case of the good faith contracts, if the pact has extinguished the whole obligation, as in the case of sale. For the previous obligation is not revived by a new pact but the pact yields a new contract. However, if the pact has the effect not of extinguishing the whole contract but of subtracting something from it, the later pact can renew the first contract. This is also the position in the case of the action for the dowry. For example, if a woman, having made a pact that the dowry be restored immediately, then makes a pact that it be restored only after the time allowed by law, the dowry reverts to its proper legal position. Nor is it to be said that the condition of the dowry is made worse by the pact. For whenever the action for the dowry returns to the legal position which the law of its nature has assigned to it, the legal position of the dowry is not made worse, but is restored to its

proper form. And this is decided by our Scaevola. 3. No pact can validly provide that there should be no liability for fraud, although, if anyone makes a pact that the action on deposit will not lie, he seems by the very nature of the agreement to have made a pact that there will be no action about fraud. This pact will avail him. 4. Pacts founded on a shameful ground are not to be enforced. An example would be, if I make a pact that I will not bring the action for theft or insult if you commit either of these delicts. For it is generally beneficial that there be fear of the penalty for theft or insult. But after these delicts have been committed, we can make a pact [not to sue]. Likewise, we cannot make a pact that I should not bring the interdict *unde vi* since this touches the public interest. In sum, if the pact does not concern private matters, it is not to be enforced. Above all, care should be taken that no agreement made in respect of one matter or with one person prejudices another matter or another person. 5. If, when you owe me ten, I make a pact that I should not seek twenty from you, it is settled that the defense of pact or of fraud will benefit you in respect of ten. Likewise, if, when you owe twenty, I made a pact that I would not seek ten, the effect of the defense raised against me is that I ought to demand only the remaining ten. 6. But if, having stipulated for ten or Stichus, I made a pact [not to sue] for ten and claim Stichus or ten, the defense of pact will bar the whole claim. For just as the whole obligation is discharged by payment of, claim for, or formal release of, one thing, so also the whole obligation is destroyed where a pact that one thing should not be sought intervenes. But if our intention was that not the ten but Stichus be delivered to me, I can successfully bring an action for Stichus, and no defense can be raised. The same applies if there has been an agreement that Stichus will not be claimed. 7. But if generally you owe a slave to me and I make a pact that I shall not claim Stichus, if, indeed, I claim Stichus, the defense of pact may be raised against me, but if I seek another slave, I shall succeed in my action. 8. Likewise, if, having made a pact that I will not claim an inheritance, I claim individual objects as heir, the defense of pact will be adjusted in accordance with what was intended just as if there was an agreement that I should not claim land and I claim a usufruct, or that I should not claim a ship or building and, after these have been taken apart, I claim individual items, unless there was a specific, contrary intention. 9. If a formal release was ineffective, it is held that the parties intended by a tacit agreement that there should be no claim. 10. A slave belonging to an inheritance cannot make a pact in the name of the heir who is to enter later because the latter is not yet owner [of the slave]. But if the pact has been concluded *in rem*, the heir can acquire the benefit.

28 GAIUS, *Provincial Edict, book 1:* Pacts agreed contrary to the rules of the civil law are not held to be valid. An example would be where a *pupillus* without the authority of his tutor, makes a pact that he will not sue his debtor, or that he will not sue for a certain period, for example, five years; for he cannot receive payment without the authority of his tutor. But the position is different if the *pupillus* makes a pact that what he owes should not be claimed from him; the pact is held to be valid because he is allowed to improve his condition even without the authority of his tutor. 1. If the curator of a lunatic or spendthrift has made a pact that a claim will not be brought against the lunatic or spendthrift, there is especial benefit in upholding the pacts of the curator; but the converse does not hold. 2. If a son or slave has made a pact that he himself will not sue, the pact is ineffective. But if they have made a pact *in rem*, that is, that a particular sum of money should not be claimed, their agreement holds good against the master or father, provided they have the free disposition of their *peculium* and the matter about which they have made a pact is connected with the *peculium*. This is not itself free from difficulty. For since it is true, as has been decided by Julian,

that he does not have the right to make gifts, even if the administration of the *peculium* has been specifically allowed to him, it follows that if, intending a gift, he has made a pact not to claim money, the pact ought not to be held valid. But if, in return for such a pact, he should obtain something of no less or even greater value, the agreement is to be held valid.

29 ULPIAN, *Edict, book 4:* But if he lent money belonging to his master, Celsus says that a pact made at the time of the loan is valid.

30 GAIUS, *Provincial Edict, book 1:* Yet in the case of a son-in-power, it must be seen whether at times the agreement is valid, if he makes a pact that he will not sue, because at times a son-in-power has an action, for example, the action for insult. But since the father also has an action on account of the insult done to his son, it cannot be doubted that the agreement of the son will not bar the father if he wishes to sue. 1. Where a person stipulates from a slave for money which Titius owed him and then claims from Titius, the question arises whether [the claim] can and ought to be met by the defense of pact, because he seems to have made a pact not to sue Titius. Julian thinks the claim may be met in this way if the action on the *peculium* is given to the stipulator against the master of that slave, that is, if the slave had a lawful ground for intervening, perhaps because he owed the same amount of money to Titius. But if he intervenes as guarantor, no action on this ground will be given against the *peculium*, and the creditor is not prevented from suing Titius. Equally, he ought in no way to be prevented if he believed that the slave was free. 2. If I take a conditional stipulation from you for what Titius owed me absolutely, can I and ought I to be met by the defense of pact if, on failure of the condition, I sue Titius? And the better opinion is that the defense may not be brought.

31 ULPIAN, *Curule Aediles' Edict, book 1:* It is quite lawful to make a pact contrary to the edict of the aediles, whether the agreement is made in the course of arranging the sale or afterward.

32 PAUL, *Plautius, book 3:* The rule already stated, namely that if a pact not to sue is made with the principal debtor, the defense is also available to a guarantor, was settled as a means of protection for the debtor so that the action on mandate might not be brought against him. Therefore, if there is no action on mandate, perhaps because he guaranteed with the intention of making a gift, it must be said that the defense does not benefit the guarantor.

33 CELSUS, *Digest, book 1:* A grandfather, in the name of his granddaughter whom he had from a son, promised a dowry and made a pact that no claim for the dowry should be brought against himself or his son. If a claim for the dowry is brought against a co-heir of the son, indeed that co-heir will not himself be protected by the defense constituted by the agreement, but the son may properly use this defense. Indeed, one is allowed to provide for the interests of one's heir, and there is nothing against providing for one only of one's possible heirs in the expectancy that he will become heir and not taking into account the interests of the others.

34 MODESTINUS, *Rules, book 5:* It is the opinion of Julian that the legal position constituted by agnation cannot be repudiated by pact, any more than a person may say that he refuses to be a *suus heres*.

35 MODESTINUS, *Replies, book 2:* Two brothers Titius and Maevius, and a sister Seia divided a common inheritance among themselves and drew up documents in which they said that they divided the maternal inheritance and guaranteed that nothing remained undivided. But afterward one brother and the sister, that is, Maevius and Seia, who were absent at the time of their mother's death, learned that gold coins had been taken by their brother of which no mention was made in the instrument of division. I ask whether, after the pact about division, an action in respect of the subtracted money is available to the brother and sister against their brother. Modestinus replied: If a defense based on the general pact is raised against those seeking to recover a portion of what was alleged to have been taken by Titius, where they have made the agreement in ignorance of the fraud committed by Titius, a rejoinder based on fraud can successfully be pleaded.

36 PROCULUS, *Letters, book 5:* If, when you possess my land, you and I agree that you deliver possession of it to Attius, where I vindicate the land from you I ought to be barred by the defense of pact only if you had already handed it over or if the agreement between us was in your interest and it was not your fault that you did not deliver.

37 PAPIRIUS JUSTUS, *Constitutions, book 2:* The Emperors Antoninus and Verus enacted by rescript that the curator cannot exempt a debtor of the municipality from payment of the debt and that releases granted to certain inhabitants of Philippi were to be revoked.

38 PAPINIAN, *Questions, book 2:* Public law cannot be changed by private pacts.

39 PAPINIAN, *Questions, book 5:* It was decided by the old jurists that an obscure or ambiguous pact prejudices the seller and lessor [*locator*] in whose power it was that the terms be set out more clearly.

40 PAPINIAN, *Replies, book 1:* A pact such as "I declare that you are not liable" is not framed *in personam*, but, since it is general, will also hold good between the heirs of the parties if they litigate. 1. One who appeals has made a pact that he will satisfy the [original] judgment within a certain time unless he has paid the money agreed as a compromise. The appeal judge, without going into any other question arising from the principal case, treats the agreement as lawful just as though it were a confession. 2. After the division of assets and liabilities, the individual creditors have accepted, as was agreed, interest with respect to the whole amount owed without assigning particular debts to particular heirs. The actions which the creditors have against all [the heirs] in respect of their shares [in the inheritance] will not be barred unless the individual [heirs], in reliance upon what had already been done, offer to the individual [creditors] the whole of what is owed. 3. A father who promised a dowry made a pact that after his death, if his daughter should die without children while the marriage lasted, a portion of the dowry should go to his heir who was his brother. That agreement, by means of the defense of fraud, will benefit children afterward born to the father and appointed heirs in his will, since the contracting parties intended that the benefit should pass to the heirs, and at that time when the father had no children other than his daughter, he is held to have referred in his testamentary disposition to his brother.

41 PAPINIAN, *Replies, book 11:* "If you pay part of the debt to me by a certain day, I will formally release and discharge you from the balance." Although the debtor has no action, it is settled that the defense of pact is available to him.

42 PAPINIAN, *Replies, book 17:* A debtor and creditor agreed that the creditor should not bear the burden of tax due on land pledged to him but that the debtor should be required to pay it. I replied that such an agreement should not be enforced insofar as it relates to the imperial treasury. For it is settled that provisions of the revenue law are not set aside by the pacts of private persons.

43 PAUL, *Questions, book 5:* We know in the case of sale which obligations rest on the seller and which, on the contrary, on the buyer. But if when the contract is made the parties introduce some change, it should be observed.

44 SCAEVOLA, *Replies, book 5:* When the state of affairs was such that a *pupillus* should be required to abstain from the inheritance of his father, the tutor made an arrangement with most of the creditors that they should receive a certain portion [of

what was owed to them]. The curators did the same with others. I ask whether the tutor, where he is also a creditor of the father, ought to retain the same portion. I replied that the tutor who had called upon the others to take a portion ought to be content with the same share.

45 HERMOGENIAN, *Epitome of Law, book 2:* An agreement for division, unless it is given effect by delivery or stipulation, as a naked pact, cannot confer an action on anyone.

46 TRYPHONINUS, *Disputations, book 2:* It is settled that a pact made between heir and legatee that security need not be given by the former is valid since, in the *semestria* (semi-annual collection of imperial ordinances), there is a constitution of the divine Marcus providing that the will of the deceased also be observed in this matter. Where a legatee has released the heir from the obligation to provide security, he cannot change his mind and make a pact to revoke the release, since it is lawful for him to place himself in a worse position with respect to the prosecution of his rights or his hope of acquiring [the object bequeathed] in the future.

47 SCAEVOLA, *Digest, book 1:* A buyer of land undertook that he would pay twenty and promised this amount by stipulation. Afterward the seller undertook an agreement by which he would be content with thirteen and would receive this within a certain time. The debtor, when sued for payment of the latter amount, made a pact that if it was not paid within a certain time, an action would lie against him on the original undertaking. The question is asked whether, when the later pact had not been kept, everything owed under the original undertaking can be recovered. I replied that according to what had been set forth it could. 1. Lucius Titius constituted as his debtor Gaius Seius, a banker with whom he had a complicated account with respect to what had been received and expended, and received from him a letter in these words: "From the banking account which you had with me I have retained in my bank on this day an amount of three hundred eighty-six arising from many transactions together with the due interest. I will refund to you the sum of gold I hold on your account under a tacit arrangement. But should any document released by you, that is written, in respect of any sum whatever, on any ground whatever, remain in my hands, it will be held as void and canceled." Where Lucius Titius before the execution of this chirograph gave a mandate to the banker Seius that he should hand three hundred to the former's patron, the question is raised whether, on account of the words of the letter providing that all documents relating to any contract whatever are to be held as void and canceled, neither Seius himself nor his sons can be sued on that head. I replied that if the account was made up only of receipts and expenditures, other obligations continued to exist.

48 GAIUS, *XII Tables, book 3:* With respect to the delivery of objects, whatever has been agreed is manifestly valid.

49 ULPIAN, *Sabinus, book 36:* If anyone lends money and makes a pact that he will sue to the extent that the debtor can pay, is the pact valid? And the better opinion is that this pact is valid. For it is not improper that anyone should wish to be sued only to the extent allowed by his resources.

50 ULPIAN, *Sabinus, book 42:* I do not consider the following pact impossible in the contracts of deposit, loan, hire, and other similar contracts: "that you do not make my slave a thief or a runaway," that is, "that you do not instigate him to become a thief or a runaway, that you do not neglect the slave so that he becomes a thief." For just as the action for corruption of a slave lies, so also can this agreement concerning the prevention of corruption take effect.

51 ULPIAN, *Edict, book 26:* If you think [wrongly] that on the ground of a legacy, you

ought to make a pact with your debtor and make a pact not to sue him, the debtor, as Celsus writes in book twenty, neither is freed by operation of law nor will he be able to defeat the claimant by the defense of pact. 1. In the same place, Celsus also writes that if you wrongly think you owe a legacy to Titius and order your debtor to pay it, and the debtor, being a creditor of Titius, makes a pact with him, neither your action against your debtor is extinguished nor his against his debtor.

52 ULPIAN, *Opinions, book 1:* A letter by which someone undertakes that another is co-heir together with him will confer no claim against the possessors of the goods comprised in the inheritance. 1. If a debtor pledges land with a creditor and makes an agreement with a person, apparently acting on the debtor's behalf, who has bought the land from the creditor, that the profits be set off against the debt, that the balance due be paid and the land restored to the debtor, the buyer's heir also ought to observe the terms of the pact made by the deceased. 2. A pact that if a creditor should pay any sum due as taxes in respect of pledged land, he should recover this from the debtor and that the debtor should pay the taxes on the land is lawful and therefore should be enforced. 3. A pact is made with persons intending to bring an action on account of the undutiful will of their father to the effect that a certain sum should be paid to them as long as the heir should live; a demand is made that the obligation to pay under the pact be perpetual. It is provided by rescript that there is no principle of law or equity allowing such a demand.

53 ULPIAN, *Opinions, book 4:* It is proper to advance expenses to a litigant, but it is not lawful to make a pact that he should not repay the amount so spent together with the legal interest but hand over half of what he should obtain from the lawsuit.

54 SCAEVOLA, *Notes to Julian, Digest, book 22:* If I make a pact not to claim Stichus who is owed to me, there is not understood to be delay [in meeting the claim] and, on Stichus's death, I do not think that the debtor is liable since before the pact there was no delay.

55 JULIAN, *Digest, book 35:* If a debtor is a usufructuary and a slave in whom he has the usufruct makes a pact that no claim should be brought against him, by concluding the pact he makes the debtor's condition better. Likewise, if a creditor was a usufructuary and had made a pact that he would not sue but the slave in whom there was a usufruct made a pact that the creditor would sue, in virtue of the pact which the slave has introduced a claim may successfully be brought.

56 JULIAN, *From Minicius, book 6:* If it is agreed that a landlord should not bring an action against a tenant and there was a lawful ground for the agreement, the tenant nevertheless can bring an action against the landlord.

57 FLORENTINUS, *Institutes, book 8:* A person who accepts in advance interest from a debtor seems by implication to have agreed that he will not seek the capital within the period for which he accepted interest. 1. If a pact is conceived in one respect *in rem*, in another *in personam*, for example, that I shall not sue or that no claim will be brought against you, my heir will have a claim against all of you [you and your heirs] and all of us [me and my heirs] can claim from your heir.

58 NERATIUS, *Parchments, book 3:* There is no doubt that by the consent of all who have entered into the obligation, withdrawal can be made from sale, hire, and other similar obligations, provided that nothing has been done. Aristo's opinion went even further. If I had carried out my obligation under a sale and, when you owed me the price, we had agreed that you would restore everything obtained from me in connection with the sale and would not pay me the price, and then you restored everything to me, you cease to owe the price, because the interpretation of good faith, on which all these matters turn, also allows this agreement. Nor does it matter whether we have

agreed to withdraw from the transaction in a case where we have not performed our obligations or whether we have agreed that there should be *restitutio in integrum* of what I have done for you under the contract and that you are under no obligation to me on that count. However, what an agreement relating to the rescission of a transaction cannot do is to compel you to restore to me what I have already given you. The reason is that in this arrangement our intention is not so much that we withdraw from the old transaction as that certain new obligations between us are constituted.

59 PAUL, *Rules, book 3:* It is settled that our legal condition can be improved through the pacts of those through whom we can acquire by stipulation.

60 PAPIRIUS JUSTUS, *Constitutions, book 8:* The Emperor Antoninus issued a rescript to Avidius Cassius providing that if the creditors [of a deceased person] are prepared to accept from the heir, although he is *extraneus*, a proportion of their debts out of the property of the deceased, recourse should first be had to relatives [of the deceased] if they are solvent.

61 POMPONIUS, *Sabinus, book 9:* No one by a pact can make it unlawful for him to consecrate his land or to bury a dead person on it or not to alienate it if his neighbor objects.

62 FURIUS ANTHIANUS, *Edict, book 1:* A debtor makes a pact that the money due should not be claimed from him, and hence that pact also benefits his guarantor. Afterward he makes a pact that a claim may be brought against him. The question is asked whether the former pact ceases to be available to the guarantor. The correct position is that the defense of pact, once acquired for the guarantor, cannot later be wrested from him against his will.

15

TRANSACTIONES

1 ULPIAN, *Edict, book 50:* A person who makes a compromise does so on the basis that a matter is doubtful and the outcome of a lawsuit uncertain or not yet determined. But a person who makes a pact generously by way of a gift relinquishes a certain and undoubted claim.

2 ULPIAN, *Edict, book 74:* A person can make a compromise not only through the addition of an Aquilian stipulation but also through the conclusion of a pact.

3 SCAEVOLA, *Digest, book 1:* The Emperors Antoninus and Verus issued a rescript in these terms: "There is no doubt that the rights of others are not prejudiced by private agreements. Wherefore, by a *transactio* made between the heir and the mother of the deceased, neither can the will be held to have been annulled nor can those manumitted or left legacies be deprived of their actions; hence, they ought to sue the instituted heir for whatever they claim on the basis of the will. In a *transactio* about an inheritance, a person either ensures that he is protected in respect of its burdens or, if he does not do so, he ought not to allow his carelessness to injure another." 1. When a *transactio* has been made [between the above parties] on account of a *fideicommissum* and afterward codicils are discovered, I ask whether the deceased's mother, should she have recovered under the *transactio* less than was due to her as her share, ought to receive the difference on the ground of the *fideicommissum*. The reply was that she ought. 2. A debtor whose creditor had sold the pledge made a compromise of little benefit to himself with Maevius who represented himself as the *heres legitimus* of the creditor; afterward when the will was published, Septicius appeared as heir. The question is raised whether Septicius, should the debtor bring against him the action on *pignus*, can use the defense of *transactio* made by the debtor with Maevius who was not heir under that will, and can Septicius recover by a *condictio* the money which had been paid to Maevius as heir by the debtor, on the ground that the money had been accepted

as belonging to the inheritance. The reply was that according to what had been set forth, Septicius could adopt neither course because he himself had not made the *transactio* with the debtor nor had Maevius received [the money] while acting on behalf of Septicius.

4 ULPIAN, *Sabinus, book 46:* The Aquilian stipulation altogether novates and destroys all preceding obligations and is itself destroyed by formal release. And we adopt this rule. Hence, even legacies left under a condition are brought within the scope of the Aquilian stipulation.

5 PAPINIAN, *Definitions, book 1:* When an Aquilian stipulation is introduced, since it is governed by consent, lawsuits which were not in the contemplation of the parties at the time are not affected. For the jurists interpret restrictively harmful generosity.

6 GAIUS, *Provincial Edict, book 17:* With respect to disputes arising from a will, there can neither be a compromise nor an investigation of the facts except on the basis of inspection and knowledge of the words of the will.

7 ULPIAN, *Disputations, book 7:* A *transactio* after judgment is valid either if there has been an appeal or if an appeal is possible. 1. Where a guarantor was sued and condemned and the principal debtor made a compromise with the person who secured the condemnation of the guarantor, the question is raised whether the *transactio* is valid. And I think it is valid in that the very ground of obligation has been discharged against both the principal debtor and the guarantor. However, if the condemned guarantor himself makes a compromise, although the *transactio* does not destroy the judgment, yet the amount due under the judgment ought to be reduced to the extent of what has been given [under the transactio]. 2. Moreover, so true is it that what has been given reduces the amount due under the judgment, even though it is not paid in pursuance of a *transactio*, that for this reason it is both said and provided by rescript that where a *transactio* about maintenance has been made without the authority of the praetor, whatever is given counts toward the maintenance. The result is that anything else which remains owing by way of maintenance is to be paid, but that credit must be allowed for what has been given.

8 ULPIAN, *All Seats of Judgment, book 5:* Since persons to whom maintenance had been left [by will], content with a small sum paid immediately, readily made compromises, the divine Marcus in a speech delivered in the senate provided that a compromise in respect of maintenance should not be valid unless made with the authority of the praetor. Therefore, the praetor generally intervenes and, acting as *arbiter* between the parties to the agreement, determines whether there ought to be a *transactio* or what it should provide. 1. There will be an inquiry by the same praetor with respect to a *transactio*, whether the legacy is of a dwelling or clothing or maintenance charged on land. 2. This speech relates to maintenance which has been left by will or codicils, whether the latter have been made with reference to a will or by someone who died intestate. The same applies in the case of a gift of maintenance made in contemplation of death or maintenance charged upon one to whom a gift in contemplation of death has been made. Again, if maintenance is bequeathed in order to satisfy a condition, we still hold the same. Obviously, it is lawful to make a compromise with respect to maintenance not given in contemplation of death even without the authority of the praetor. 3. The speech applies whether maintenance was to be paid monthly, daily, or annually. The position is the same if maintenance has been left not forever but for a certain number of years. 4. A capital sum was bequeathed to someone in order that he might maintain himself from the interest and restore the capital at the time of his death. The speech will not be inapplicable to this case although the maintenance

does not seem to have been left in the form of annual payments. 5. But if a certain sum of money or property is left to Titius so that maintenance be paid out of it to Seius, the better opinion is that Titius can make a compromise; for the maintenance of Seius is not decreased by the *transactio* of Titius. And the position is the same if maintenance has been charged upon a legatee by a *fideicommissum* for this purpose. 6. The speech declares invalid that type of *transactio* which is made to enable someone to spend money immediately. What is the position, therefore, if someone makes a *transactio*, without the authority of the praetor, under which he should obtain payment on a monthly basis of what had been left to him annually or he should obtain payment on a daily basis of maintenance left monthly? What is the position if he obtain at the beginning of the year the maintenance he should receive at the end? And I think such a *transactio* is valid because the person entitled to maintenance makes his condition better by it. For the intention of the speech was to prevent the removal of maintenance by a *transactio*. 7. Moreover, it makes no difference whether maintenance has been left to freedmen or freeborn persons or whether they have sufficient resources or not. 8. Therefore, the speech requires the praetor to conduct an investigation into the following matters: first, the ground of the *transactio*; second, the amount; and third, the individuals proposing the arrangement. 9. As to the ground, the subject matter for investigation is the ground for the agreement; for unless there is a ground, the praetor will entertain no proposal for a *transactio*. Grounds commonly alleged are: that the heir lives in one place, the person entitled to maintenance in another or that one of them intends to transfer his home or that there is an urgent need for immediate funds or that maintenance has been charged on several persons in favor of someone and it is difficult for him to sue them individually one by one or that there was some other ground, as there are frequent occurrences which persuade the praetor to allow the *transactio*. 10. Also the amount of money relevant to the *transactio* is to be determined, that is, the sum payable under it. For the good faith of the *transactio* is also assessed by reference to the amount to be paid. Further, the amount is to be determined by reference to the age of the person who accepts a composition and also by reference to his state of health. For it is obvious that it is one thing to make an arrangement with a boy, another with a youth, and another with an old man. For it is settled that maintenance ends with life. 11. Again, consideration of the individual is also to be made, that is, of the way of life followed by those to whom maintenance is left. The investigation should consider whether they are of a frugal habit and can, apart from the maintenance, provide sufficiently for themselves or whether their mode of life is less satisfactory and they are dependent upon the maintenance. With regard to the person on whom maintenance is charged, the matters to be looked into are: What are his resources, what is his way of life, and what is the general opinion held of him? For then it will appear whether he wishes to cheat the person with whom he makes the *transactio*. 12. One who makes a composition about maintenance is not held to have made a composition about dwelling or clothing, since the deified Marcus intended that there should be particular compositions also made with respect to these matters. 13. Again, if someone makes a composition about maintenance, he will not necessarily against his will have also to make a composition about housing and the other matters. Therefore, he could make a *transactio* either about everything together or just about certain things. 14. A composition may also be made about shoe money by the authority of the praetor. 15. If land was left to one or more persons for their maintenance and they wish to sell, it is necessary that the praetor issue a decree concerning the sale and *transactio*. But if land was left to several persons for their maintenance and these make an arrangement among themselves, the *transactio*, if made without the authority of the praetor, cannot be valid. The position is the same if land was burdened by a provision for maintenance; for a pledge given for this purpose cannot be freed without the consent of the praetor. 16. It is more than obvious that by the authority of the praetor, arrangements can be made either about maintenance

as a whole or about part of it. 17. If the praetor is approached and permits the arrangement to take place without knowledge of its ground, the *transactio* will be of no effect. For this matter of ground is entrusted to the praetor for investigation, and it should not be neglected or waived. Again, if he does not investigate everything which the speech specifies, that is, the ground, the amount and the way of life of those making the arrangement, it must be said that, although he has investigated certain things, the *transactio* is void. 18. But neither the governor of a province nor the praetor can delegate jurisdiction with respect to this matter. 19. *Transactiones* with respect to maintenance can also be made before an imperial procurator, that is, where maintenance is sought from the imperial treasury. Accordingly, compositions can also be made before the prefects of the treasury. 20. If a lawsuit was in fact about maintenance but was compromised, the *transactio* cannot be valid without the consent of the praetor; this is to prevent circumvention of the speech. For it would be possible to invent lawsuits in order to secure the making of a *transactio* even without the authority of the praetor. 21. If maintenance and a legacy as well are given to the same person, the latter with immediate effect, and a *transactio* was made without the authority of the praetor, what has been paid is imputed first to the legacy made with immediate effect, and anything left over to the maintenance. 22. If anyone makes a composition about maintenance without the authority of the praetor, any payment under it counts toward arrears of maintenance. Nor does it matter whether the arrears amount to the same as what is paid or to less or more. For if it is less, still what has been paid is imputed to the arrears of maintenance. It is true that if the person who made a composition about the maintenance has profited through the payment, it is most equitable that any action for the amount by which he profited will be given against him for he ought not to profit from another's loss. 23. If a certain amount of money has been left annually to someone, a man of high rank, for example, an annual allowance or a usufruct, a *transactio* can be made even without the praetor. But if a modest usufruct is made by way of maintenance, I say that a *transactio* made without the praetor is of no effect. 24. Where someone was left not money for maintenance but corn and oil and other things necessary for life, he cannot make a composition about them whether they are left to him on an annual or a monthly basis. Yet suppose he makes a composition without the praetor to the effect that, in place of these commodities, he should receive money payable annually or monthly and changed neither the time nor the amount but only the kind, or, conversely, suppose he made a pact that he would receive maintenance in kind, where it had been left to him in money, or suppose he changed wine for oil or oil for wine or anything else, or changed the place, in order to receive in a municipality or province the maintenance which was left to him at Rome or vice versa, or changed the person in order to receive from one what he was to receive from several, or accepted one person for another as debtor? All these matters are to be submitted to the judgment of the praetor and are to be decided in accordance with the benefit accruing to the person entitled to maintenance. 25. If a certain sum of money is left annually to provide a dwelling and a composition is made without the praetor under which a dwelling is provided, the *transactio* is valid because the advantage of a dwelling is secured although it is subject to the hazard of collapse or fire. Again, in the converse case if there is an agreement that a certain sum of money be paid instead of a dwelling which was left, the *transactio* is valid even without the praetor.

9 ULPIAN, *Opinions, book 1:* Where a person has sued his tutors with respect to that part of the guardianship which affects him alone and has made a composition with them, he cannot be met by an objection based on the *transactio* when suing the same tutors in the name of his brother whose heir he is. 1. Whatever *transactio* is made is considered to relate only to those matters settled by the parties to the agreement. 2. Where a person through the deceit of his co-heirs does not know the true state of affairs and has executed a deed of *transactio* without the Aquilian stipulation, he does not make a pact; rather he is defrauded. 3. Where someone not yet certain

that he has the complaint to set aside his father's will as unduteous makes by pact a compromise with rival claimants relating to other matters, the pact will operate as a bar only in respect of matters as to which the intention of the parties can be proved. Even though the person making the *transactio* was more than twenty-five, it will operate as a bar only with respect to matters of which there is proof of intention. For where he afterward discovers that actions are available to him in respect of certain matters, it is not fair that these should be destroyed by the pact in that they refer to matters to which it is not shown that he had given consideration.

10 ULPIAN, *Replies, book 1:* It is settled that where a father makes a compromise with respect to the affairs of sons who were not in his power, the compromise does not constitute a bar so far as they are concerned.

11 ULPIAN, *Edict, book 4:* A *transactio* can be made after judgment even if an appeal has not been taken, provided that the existence of a judgment is denied or there is room for doubt whether it has been given, since it is possible that the suit still subsists.

12 CELSUS, *Digest, book 3:* It is not to be tolerated that a person who has made a composition generally, with respect to what has been left by will, should afterward urge that his intention referred only to what had been bequeathed in the first part of the will and not to what is bequeathed in a later part. Yet, if codicils are afterward produced, he is held to be able to say to me, not dishonestly, that his intention related only to what was written in the tablets he knew of at the time he made the arrangement.

13 AEMILIUS MACER, *Five Percent Statute on Inheritance, book 1:* None of the imperial procurators is allowed to make a *transactio* without consulting the emperor.

14 SCAEVOLA, *Replies, book 2:* A dispute between the *heres legitimus* and the instituted heir has arisen and, after a *transactio* with the creditors had been made, was settled on certain terms. I ask: Whom can the creditors sue? He replied: If the creditors were the ones who made the *transactio,* the procedure to be observed with respect to debts is that to which they had agreed. If the creditors were others, in view of the uncertainty of the succession, both [the *heres legitimus* and the instituted heir] are to be sued by *utiles actiones* on account of that share in the inheritance which each had obtained through the agreement in the *transactio.*

15 PAUL, *Views, book 1:* After a pact has been agreed, the Aquilian stipulation is generally added; but it is wiser to add a penal stipulation as well because, should the pact perchance be rescinded, the penalty provided by the stipulation can be sought.

16 HERMOGENIAN, *Epitome of Law, book 1:* A person who breaks faith in respect of a lawful *transactio* not only will be met by a defense but may be compelled to pay the penalty which he had promised in correct form by stipulation, should he act contrary to what had been agreed, where the pact remains valid.

17 PAPINIAN, *Questions, book 2:* A seller of the inheritance after mandating to the buyer actions against a debtor of the inheritance, who did not know the inheritance was sold, made a composition with the latter. If the buyer of the inheritance wishes to demand the debt from the debtor, a defense on the ground of the composition is to be allowed him on account of his lack of knowledge. The same is also to be held in the case of one who receives an inheritance under a *fideicommissum,* if the heir makes a composition with a debtor who is unaware of this.

BOOK THREE

1

APPLICATIONS TO THE MAGISTRATE

1 ULPIAN, *Edict, book 6:* The praetor issued this title for the sake of taking into account and protecting his position and for the sake of his own dignity, to prevent applications being made before him without restriction by all and sundry. 1. For this purpose he distinguished three classes. Some people he refused to allow to make application at all, others he permitted to do so only on their own behalf, while others he permitted to do so on their own behalf and on that of a limited number of specified persons. 2. To make application is to set out one's own claim or that of one's friend in court before the presiding officer, or to oppose the claim of another. 3. The praetor began with those who are forbidden to make application at all. In this edict, he makes either youth or disability ground for exclusion. He forbids anyone below the age of seventeen, who has not fully attained this age, to make application, because he thought this a tender age for appearing in public, although it was at this age or a little older that Nerva the Younger is said to have given consultations on points of law in public. On the ground of disability, he forbids a deaf person without any hearing at all to make application before him. For no one was to be allowed to make application who was unable to hear the praetor's decree. This would have been dangerous even for the applicant himself; for if he had not heard the praetor's decree, he would have been punished as contumacious for not obeying it. 4. The praetor says: "If they do not have an advocate, I will appoint one." The praetor is accustomed to show this consideration not only to the persons mentioned above but also to anyone else who for certain reasons, because of either intrigues or duress on the part of his opponent, has not found an advocate. 5. Next comes an edict against those who are not to make application on behalf of others. In this edict the praetor debarred on grounds of sex and disability. He also blacklisted exceptionally disreputable persons. On the ground of sex, he forbids women to make application on behalf of others. There is a reason for this prohibition, to prevent them from involving themselves in the cases of other people contrary to the modesty in keeping with their sex and to prevent women from performing the functions of men. Its introduction goes back to a shameless woman called Carfania who by brazenly making applications and annoying the magistrate gave rise to the edict. On the ground of disability, the praetor rejects the man blind in both eyes, obviously because he cannot see and respect the magistrate's insignia. Labeo also has a story of Publilius, the blind father of Nonius Asprenas, when he wished to make an application, being left in the lurch by Brutus turning away his chair. But although a blind man cannot make an application on behalf of someone else, yet he keeps his senatorial rank and can also act as judge. Could he then also hold magistracies? This needs discussion. There is certainly an example of a man who did so. Appius Claudius, though blind, took part in councils of state; and in the senate expressed a very stern view on Pyrrhus's prisoners of war. But it is better to say that the blind man can retain a magistracy already entered upon but is absolutely

forbidden to seek another one. There are many examples in support of this opinion. 6. He also forbids a man who has been a catamite to make applications on behalf of others. However, anyone raped by the violence of robbers or the enemy ought not to be blacklisted, as Pomponius also says. The man too who has been condemned on a capital charge does not have the right to make an application on behalf of someone else. Likewise, a man condemned on a charge of vexatious litigation (*calumnia*) in a criminal court is forbidden by a *senatus consultum* to make applications even before the judges in the lower courts. So too with the man who has hired out his services to fight against beasts. But we ought to interpret the term beasts by reference to the animal's ferocity rather than to its species. For what if it should be a lion, but a tame one, or some other tame carnivore? It is, then, only the man who has hired out his services who is blacklisted, whether he ends up by fighting or not. For if he fights when he had not hired out his services, he will not be liable. For it is not the man who has fought against beasts who will be liable, but only the man who has hired out his services for this purpose. Accordingly, the old authorities say that those who do this without pay to exhibit their prowess are not liable, unless they have accepted prizes in the arena. For in my opinion these do not escape the blacklist. But anyone who hires out his services to hunt wild animals or to fight outside the arena one which is damaging the district is not blacklisted. These persons, then, who have not fought against beasts only in order to demonstrate their prowess, the praetor allows to appear before him on their own behalf but forbids their doing so on behalf of someone else. But if persons of this sort are tutors or curators, the fairest thing is for them to be allowed to make applications for those in their care. Anyone shown to have acted contrary to these regulations is debarred by an interdict against his applying on behalf of others, and will also be punished by a fine fixed by the assessment of a judge *extra ordinem*. 7. As we said at the beginning of this title, the praetor distinguished three classes of those not able to make applications. The third class of these consists of people who are not to apply on behalf of anyone they please but to whom the praetor does not entirely deny the right of applying on the ground that they have been less at fault than those blacklisted in the previous sections. 8. The praetor says: "Those who are forbidden by plebiscite, *senatus consultum*, edict, or decree of the emperors to make applications except on behalf of certain persons are not to make applications in my court on behalf of a person other than one for whom they will be allowed to do so." This edict refers also to all the others who are blacklisted as incurring *infamia* in the praetor's edict. All these are not to make applications except on their own behalf or that of certain people only. 9. Then the praetor adds: "Who out of all those mentioned above has not received *in integrum restitutio*." The words "him who out of those mentioned above" must be taken to mean "if he is one of those who are included in the third edict and are forbidden to make applications except on behalf of certain persons." If he is one of those previously referred to, *in integrum restitutio* will be obtained only with difficulty. 10. What sort of *in integrum restitutio* is it of which the praetor speaks? Is it that by the emperor or senate? Pomponius raises the question, and his opinion is that it was considered to be about the *in integrum restitutio* granted by the emperor or senate. But the question is asked whether the praetor too can confer *in integrum restitutio*. In my view, decrees of this sort by the praetors should not be upheld except in cases where they have given help in the course of their administration of justice. This happens where fraud has been practiced on someone underage and in the other cases we shall set out in the title dealing with *in integrum restitutio*. The opinion of Pomponius, that anyone condemned in a trial involving *infamia* and then absolved through *in integrum restitutio* is freed from *infamia*, is in accordance with this view. 11. Then, the praetor adds: "They are not to make an application on anyone's behalf except that of a parent, patron, patroness, and children or parents of patron or patroness." We have dealt more fully with these persons in the title dealing with the summons. Likewise, he adds: "his own children, brother, sister, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepson, stepdaughter, *pupillus*, *pupilla*, lunatics male and female,

2 GAIUS, *Provincial Edict, book 1:* "idiots male and female, since a curator is appointed for these persons too,

3 ULPIAN, *Edict, book 6:* "anyone to whom such a tutelage or curatorship over them has been given by a parent or by the decision of the majority of their tutors or by a person having jurisdiction in this matter." 1. We ought not to count former relationships by marriage but only existing ones. 2. Pomponius also says that under the terms "daughter-in-law," "son-in-law," "father-in-law," and "mother-in-law" are included as well remoter relations who usually have the prefix *pro-* added. 3. Among the curators he ought to have added those of the dumb and of all the others for whom they are usually appointed, that is, the deaf, the spendthrift, and those underage (*adulescentes*):

4 PAUL, *Edict, book 5:* likewise, those for whom the praetor usually appoints a curator because of their incapacity,

5 ULPIAN, *Edict, book 9:* and those who are unable to look after their own affairs because of some chronic disease.

6 ULPIAN, *Edict, book 6:* In my opinion, all who are performing a function not of their own wish but from necessity can make applications without infringing the Edict, even if they should belong to the class of those who can only make applications on their own behalf. 1. Anyone forbidden to practice advocacy, if, as is usual, the ban applies to the magistrate's own court and to the period of his magistracy, can in my opinion afterward appear in court before the magistrate's successor.

7 GAIUS, *Provincial Edict, book 3:* Those whom the praetor forbids to make applications in his court, he forbids absolutely, even if the other party would allow them to do so.

8 PAPINIAN, *Questions, book 2:* The Emperor Titus Antoninus said in a rescript that a man banned from practicing as advocate for five years was allowed at the end of the five years to make applications on anybody's behalf. The deified Hadrian too had said in a rescript that the returned exile was able to make applications. The offense for which suspension or exile has been inflicted makes no difference. The reason obviously is to prevent a punishment with a time limit being prolonged further, contrary to the intention of the sentence.

9 PAPINIAN, *Replies, book 1:* A person forbidden to make an application on another's behalf for a reason that does not bring *infamia* with it and so does not take away the right to make applications on behalf of everybody loses the right to make applications on behalf of others only in the province in which the man who sentenced him was governor; he is not prevented from doing so in any other province, even one of the same name.

10 PAUL, *Rules, sole book:* Those who appear in cases for the imperial treasury are not forbidden to appear in a case of their own or their sons and parents or *pupilli* under their tutelage even against the imperial treasury. Decurions too are forbidden to appear in cases against their own state but not in cases of the above persons.

11 TRYPHONINUS, *Disputations, book 5:* Our emperor has said in a rescript that a tutor is not forbidden to appear for his *pupillus* in a matter in which he had acted as advocate against the father of the *pupillus*. Accordingly, he permitted a tutor to appear against the imperial treasury in a case of his *pupillus* in which he had previously been advocate for the treasury against the father of his *pupillus*. 1. Who incur *infamia* will be made clear in the following title.

2

PERSONS INCURRING *INFAMIA*

1 JULIAN, *Edict, book 1:* The praetor's words are: "The following incur *infamia*: one who has been discharged from the army in disgrace by his general or the person with the power of decision in this matter; one who has appeared on the stage to act or recite; one who has kept a brothel; one who in criminal proceedings has been judged guilty of vexatious litigation or collusion in anything; one who has been condemned in his own name for theft, robbery with violence, insult, fraud, trickery or compromised in such a case; one who has been condemned in his own name, and not in a cross-action, in a case of partnership, tutelage, mandate, or deposit; one who, after the death of his son-in-law, although knowing him to be dead, has, within the period of time customary for mourning a husband, given in marriage a woman he had in power, before her mourning for her husband was completed; anyone who has knowingly married such a woman without being ordered to do so by him in whose power he is; one too who has allowed anyone whom he had in power to marry the woman described above; or one who in his own name and not on the order of anyone in whose power he was, or in the name of him or her whom he had in power, has at the same time entered into two agreements for betrothal or marriage."

2 ULPIAN, *Edict, book 6:* When the praetor says, "one who has been discharged from the army," we should understand him to be referring to the discharge of a private soldier or of anyone else up to the rank of centurion, prefect of a cohort, squadron or legion or tribune of a cohort or legion. Pomponius goes further than this and says that even the commander of an army, though of consular rank, if he has been given an ignominious discharge by the emperor, suffers from being blacklisted in this way. So even if it is a general in charge of an army who has been discharged, he is blacklisted and if the emperor has discharged him and added that he does so with ignominy, as he usually does, you will be in no doubt that he has also incurred *infamia* under the praetor's edict. However, this is not so if a successor to him has been appointed without displeasure on the part of the emperor. 1. By army we mean not a single cohort or squadron but large numbers of soldiers. For we say a man is in command of an army when he is responsible for a legion or legions which with their auxiliaries have been entrusted to him by the emperor. But in this connection we shall regard the man who has been dismissed from the command of any large body of soldiers also as having been dismissed from the command of an army. 2. "Discharged with ignominy." The reason for the qualification is that there are many kinds of discharge. There is an honorable discharge granted by the emperor on completion of the term of service or before. There is a discharge on medical grounds which brings release from the rigors of military life for health reasons. There is the ignominious discharge. A discharge is ignominious when the man responsible has specifically added that the discharge is with ignominy. For he is always obliged to add why the soldier is being discharged. But he also inflicts *infamia* on him if he has dismissed him in a dishonorable fashion, that is, has stripped him of his military insignia, even though he has not added that he was so dismissed with ignominy. There is also a fourth kind of discharge if anyone had joined the army to evade his responsibilities. But this sort of discharge does not damage one's standing, as has been said very often in rescripts. 3. A soldier condemned under the *lex Julia* on adultery incurs *infamia* because his release with ignominy from his oath is the immediate consequence of the verdict. 4. Those discharged with ignominy are not permitted to stay in the city or anywhere else where the emperor is. 5. The praetor says: "One who has appeared on a stage incurs *infamia*." A stage, according to Labeo's definition, is a structure set up for giving shows in any place where anyone may stand or move to perform, whether the place be public, private, or

in the street, provided only that the general public is admitted to the performance. For Pegasus and Nerva the Younger said in replies that those who lower themselves to take part in contests for gain and all appearing on the stage for reward incur *infamia.*

3 GAIUS, *Provincial Edict, book 1:* One who has hired himself out to appear on the stage and does not do so is not blacklisted, because this activity is not so disgraceful that even the intention requires punishment.

4 ULPIAN, *Edict, book 6:* Sabinus and Cassius said in replies that athletes were in no way stage performers; for their object was to display their prowess. On the whole, the general and, it appears, the correct view is that theater musicians, athletes, charioteers, those who sprinkle the horses with water, and all the others who work in the contests run by the state should not be held to incur *infamia.* 1. Celsus supports the view that ushers, whom the Greeks call βραβευταί, do not practice the theatrical art, because it is an office and not the theatrical art which they exercise. And certainly nowadays it is as no small favor that the post is given by the emperor. 2. The praetor says: "One who has kept a brothel." A brothel-keeper is a man who has had slaves for hire as prostitutes, though the man who carries on the trade with free girls is in the same position. He is liable to punishment for brothel-keeping whether this is his main occupation or whether he carries on another business as well, as, for example, if he was the keeper of an inn or tavern and had slaves of this sort working for him who took advantage of their employment to ply their trade, or if he was a bath-manager having, as is the practice in certain provinces, slaves in his baths hired to guard clothing who followed this kind of trade in their place of work. 3. Pomponius says that one who while in servitude caused slaves belonging to his *peculium* to act as prostitutes is also blacklisted after being freed. 4. The vexatious litigant is only blacklisted if he has been condemned for the offense; for it is not enough merely to have committed it. It is the same with the prevaricator. The prevaricator is, as it were, a straddler (*varicator*) who helps the other party by betraying his own side. Labeo says that the name is derived from *varia certatione* (contending on different sides); for the prevaricator has stood on both sides, or rather on the opposing one. 5. Likewise, anyone who has been condemned in his own name for theft, robbery with violence, insult, or fraud, or compromised in such a case incurs *infamia* in a similar fashion,

5 PAUL, *Edict, book 5:* since the person who compromises is assumed to admit the offense.

6 ULPIAN, *Edict, book 6:* Theft includes manifest and nonmanifest theft. 1. But if anyone condemned for theft or in other actions involving *infamia* has appealed, while his trial is pending he is considered not yet to have incurred *infamia.* But if all the periods for an appeal have passed, he incurs *infamia* retrospectively; although if his appeal has been dismissed, he is in my opinion blacklisted with effect from this time, he is not blacklisted retrospectively. 2. A person condemned in someone else's name does not suffer *infamia.* It is for this reason that my procurator, defender, tutor, curator, or heir will not incur *infamia* if condemned for theft or as the result of some other similar case; nor I myself if the case has been carried on from the beginning through my procurator. 3. He says: "Or has compromised." We take anyone to have compro-

mised if the compromise includes a payment for any amount. Otherwise, a person who has begged off an action against him will be blacklisted, and there will be no way to pardon, which is inhumane. 4. A person who has compromised by making a payment on the order of the praetor is not blacklisted. 4a. Indeed, anyone called upon to take an oath who has sworn he has not committed an offense will not be blacklisted; for in a way he proved his innocence by his oath. 5. "Condemned in an action on mandate." The words of the edict put on the blacklist not only a person who has taken on a mandate but also one who does not display the good faith the other party trusted to. For example, suppose I have given a verbal guarantee on your behalf and paid up. If I secure your condemnation in an action on mandate, I bring *infamia* upon you. 6. Obviously, it needs adding that sometimes the heir is condemned in his own name and so incurs *infamia*, if he has behaved dishonestly in the matter of a deposit or mandate; but he cannot be condemned in his own name as regards tutelage or partnership, because an heir does not inherit either tutelage or partnership but only debt from the deceased. 7. He will not incur *infamia* if condemned in *actio contraria*, and rightly so. For in *actiones contrariae* it is not a question of breach of faith but of arithmetic which in general is usually settled by the action.

7 PAUL, *Edict, book 5:* In actions which arise out of a contract, although they involve *infamia* and those condemned are blacklisted, yet the person who has compromised is not blacklisted. Rightly so, since compromise is not so disgraceful in this case as in the previous ones.

8 ULPIAN, *Edict, book 6:* He says: "After the death of a son-in-law." The praetor was right to add "although he knew he had died" to prevent ignorance being punished. But since the time of mourning starts immediately, it is right for it to run, even for a wife in ignorance, from the day of her husband's death, and it is for this reason that Labeo says that if she finds out after the statutory time, she both dons and doffs her mourning on that one day.

9 PAUL, *Edict, book 5:* Husbands do not have to mourn for their wives. No mourning is required for a fiancé.

10 PAUL, *Edict, book 8:* It is customary to obtain the emperor's permission for a woman to marry within the statutory time. A woman is not penalized for betrothal during the period of mourning for her husband.

11 ULPIAN, *Edict, book 6:* Mourning for children or parents is no obstacle to marriage. 1. Even if the husband is the sort of man ancestral usage requires no mourning for, his wife cannot be given in marriage within the statutory time; for because of confusion over parentage the praetor stuck to the time during which a husband would ordinarily be mourned. 2. Pomponius is of the opinion that a woman who has given birth within the statutory time can marry immediately, and I think this is right. 3. As Neratius says, it is not customary to mourn enemies of the state, men found guilty of treason, those who have hanged themselves, or men who have committed suicide not out of weariness with life but through a guilty conscience. If anyone, then, gives herself in marriage after the death of her husband in this fashion, she will incur *infamia*. 4. Blacklisted also is "the man who married her," but only if he did so with full knowledge; for ignorance not of law but of fact frees him from blame. Free from blame is the man who married her by order of the person in whose power he was and this person who allowed the marriage is himself blacklisted. Both rulings are correct; for he who obeyed deserves pardon and he who allowed the marriage incurs *infamia*.

12 PAUL, *Edict, book 5:* A man who has married on his father's order is not blacklisted even though he has kept his wife after being freed from his father's power.

13 ULPIAN, *Edict, book 6:* What is the position if he has not given permission for the marriage, but has sanctioned it after it has taken place? Suppose, for example, that initially he was unaware of the bride's situation but knows later? He will not be blacklisted; for the praetor has regard to the position at the beginning of the marriage. 1. Anyone who has arranged two betrothals in someone else's name is not blacklisted unless he arranges them in the name of someone, either male or female, under his power. Obviously, a person who allows his son or daughter to make the arrangement can be considered in a way to have done so himself. 2. When the praetor says, "the same time," it must be taken to refer not to the betrothals being agreed upon at the same time but to their running concurrently. 3. Likewise, if she has married one man while betrothed to another, punishment is inflicted in accordance with the intention of the edict. 4. Since the deed is blacklisted, even if anyone only arranges for a marriage or betrothal with a woman he either cannot or should not take as his wife, he will be on the blacklist. 5. An *arbiter* appointed under a joint undertaking (*compromissum*) does not inflict *infamia*, because the judgment is not applicable in all respects. 6. With regard to *infamia*, it makes a good deal of difference whether something was delivered as a judgment on the case before the court at the end of the hearing or whether certain things were comments in passing; for *infamia* is not inflicted because of the latter. 7. The imposition of a heavier penalty than a statute allows safeguards standing. There are *constitutiones* and replies to this effect. Suppose, for example, that a governor has relegated a man who ought only to have been mulcted of part of his property. It will have to be said that the excessive penalty has put an end to any question about his standing, and that for this reason he does not incur *infamia*. But if in a case of nonmanifest theft the judge condemned the defendant to a fourfold fine, he has certainly been harshly treated with the increased penalty, since he should only have been sued for double for nonmanifest theft, but this fact has not safeguarded his standing; although if he had been too harsh with a nonpecuniary penalty, it is held that this is the end of the matter. 8. Conviction for fraud (*stellionatus*) carries with it *infamia* though the proceedings are not criminal.

14 PAUL, *Edict, book 5:* A slave in whose name his master has accepted a noxal action and then made the same slave free and his heir does not incur *infamia*, if condemned in this case, because he is not condemned in his own name, since he was not initially the defendant at the joinder of issue.

15 ULPIAN, *Edict, book 8:* Blacklisted is the woman who by vexatious litigation (*calumnia*) in the name of her unborn child has been allowed possession through claiming she is pregnant,

16 PAUL, *Edict, book 8:* although she was not pregnant or had become so by someone else.

17 ULPIAN, *Edict, book 8:* For a woman who has deceived the praetor has deserved punishment, but the one blacklisted is the woman who does this of her own choice.

18 GAIUS, *Provincial Edict, book 3:* A woman who has made a mistake through an error of judgment cannot be held to have gained possession through vexatious litigation.

19 ULPIAN, *Edict, book 8:* Only a woman declared to have been allowed possession as the result of vexatious litigation is penalized. This principle should be observed also with regard to the father who has permitted a daughter he had in power to be allowed possession in the name of her unborn child as the result of vexatious litigation.

20 PAPINIAN, *Replies, book 1:* The words "you appear to have instigated the suit by a clever lie" in the judgment of a provincial governor increase humiliation rather than,

it seems, inflict *infamia*; for a person giving encouragement is not performing the function of a mandator.

21 PAUL, *Replies, book 2:* Lucius Titius sued Gaius Seius on a charge of insult and read an affidavit on this matter before the praetorian prefect. The prefect placed no trust in the affidavit and gave judgment that Lucius Titius had not suffered any insult at the hands of Gaius Seius. My question is: are the witnesses whose testimony has been rejected, thought to have incurred *infamia* for bearing false witness? Paul's reply was that no reason was advanced why the subjects of the inquiry ought to be considered in this position, since one person ought not to suffer as the result of a judgment, whether just or unjust, upon another.

22 MARCELLUS, *Publica, book 2:* A beating with cudgels does not carry *infamia* but the issue is whether the ground on which he earned the punishment was such as brings *infamia* on the person convicted. The same principle has also been laid down as regards other forms of punishment.

23 ULPIAN, *Edict, book 8:* Parents, children of either sex, as well as all other agnates or cognates should be mourned in accordance with the sense of propriety, grief of mind, and wish of each individual. A person who has not mourned them does not incur *infamia*.

24 ULPIAN, *Edict, book 6:* The Emperor Severus said in a rescript that a woman's standing was not harmed by the occupation she had followed while in servitude.

25 PAPINIAN, *Questions, book 2:* It is held that a disinherited son too should mourn the memory of his father, and the legal position is the same also with respect to a mother whose inheritance does not go to her son. Anyone who has fallen in war will be mourned even if his body is not found.

3

PROCURATORS AND DEFENDERS

1 ULPIAN, *Edict, book 9:* A procurator is one who transacts the business of another on a mandate from his principal. 1. A procurator may have been appointed either for all his principal's business or only for one item of it, either in his principal's presence or by message or by letter; although certain people, as Pomponius writes in his twenty-fourth book, do not consider that a person taking on a mandate for only one item of business is a procurator, just as a man who has undertaken to convey a thing or to convey a letter or message is not properly called a procurator either. But it is more reasonable to consider a person appointed for one piece of business only as also a procurator. 2. A procurator is a very necessary institution for enabling those who will not or cannot look after their own affairs to sue or be taken to court through the agency of others. 3. A procurator can be appointed even in his absence,

2 PAUL, *Edict, book 8:* provided that the man thought to have been appointed has been informed and given his approval. 1. A lunatic is not to be regarded as one absent because he lacks the intellect to ratify anything done.

3 ULPIAN, *Edict, book 9:* Likewise, he can be appointed for an impending lawsuit, for a future date, conditionally and until a certain date,

4 PAUL, *Edict, book 8:* and for an indefinite period.

5 ULPIAN, *Edict, book 7:* A person is considered to be present when he is in the garden,

6 PAUL, *Edict, book 6:* when he is in the forum, and when he is in the city and in adjacent buildings;

7 ULPIAN, *Edict, book 7:* and for this reason his procurator is considered to have his principal present.

8 ULPIAN, *Edict, book 8:* A son-in-power can also appoint a procurator for any action which he has the right to bring himself, and not just a son with a military *peculium*, but also any son-in-power. For example, if he has suffered insult, he will appoint one for an action for insult if it so happens that his father is away and his father's procurator refuses to go to court; and this appointment of a procurator by a son-in-power himself will be in accordance with the law. Julian goes further than this and writes that if insult should be committed against a son-in-power, himself a father, by way of his own son, who is still in the same power and the grandfather is away, the father is able to appoint a procurator to exact retribution for the insult which the grandson of the absent man has suffered. A son-in-power will also be able to appoint a procurator to defend a case. Furthermore, a daughter-in-power will also be able to appoint a procurator for an action for insult. As regards her appointing, in conjunction with her father, a procurator to exact payment of her dowry, Valerius Severus writes that it is needless since it is enough for her father to appoint in accordance with her wishes. But in my opinion, if her father happens to be away or of doubtful character, in a case where an action on dowry is usually available to a daughter, she can appoint a procurator. A son can also himself be appointed procurator both for prosecution and defense. 1. It is not customary to appoint an unwilling procurator. We should take the word unwilling to include not only the man who refuses but also the one for whose consent there is no evidence. 2. Veterans can become procurators, but soldiers cannot be appointed procurators even if the other party agrees, unless at the time of joinder of issue this has been overlooked through some circumstance or other. An exception is made for the man who has been appointed procurator for his own interest, or who is to conduct or undertakes a case he has in common with all his comrades. To them this sort of procuratorship has been allowed. 3. The praetor says: "I will compel a procurator appointed to undertake a lawsuit, on whose behalf and with whose consent his principal has arranged to satisfy judgment, to accept trial." But he should not be compelled if there are good reasons for not doing so. Suppose, for example, a deadly, personal enmity has arisen between the procurator and his principal. Julian writes that an action against the procurator ought to be refused. Likewise, if the procurator has gone up in rank or is going to be absent on public business

9 GAIUS, *Provincial Edict, book 3:* or if he pleads ill-health or unavoidable absence from home

10 ULPIAN, *Edict, book 8:* or coming into an inheritance keeps him busy or for any other adequate reason. Furthermore, a procurator should also not be put under compulsion if his principal is present,

11 PAUL, *Edict, book 8:* provided that constraint can be put upon the principal.

12 GAIUS, *Provincial Edict, book 3:* But it is said that for the following reasons (*also*) a procurator should sometimes be compelled to accept trial, for example, if his principal is not present and the plaintiff asserts that with lapse of time the suit is going to be lost.

13 ULPIAN, *Edict, book 8:* But these arguments are neither to be allowed indiscriminately nor to be dismissed without consideration but must be given their due weight by the praetor after examination of the case.

14 PAUL, *Edict, book 8:* If after the appointment of procurator a deadly enmity has arisen, he should not be compelled to accept trial, and the stipulation for failure to defend does not become operative since the circumstances of the case have changed.

15 ULPIAN, *Edict, book 8:* If a principal has died before joinder of issue, after entering into a stipulation for satisfaction of judgment on his procurator's behalf, the procurator should be compelled to accept trial but only if the principal did this with the knowledge and not against the express wish of the procurator. For otherwise, it is very much against the spirit of the law for the procurator to be held liable, and the section of the stipulation for failure to defend becomes operative. 1. A person appointed for a trial for dividing common property will be deemed to have been appointed both for plaintiff and defense because of the provision of security by both sides.

16 PAUL, *Edict, book 8:* Before joinder of issue the principal has the right either to change his procurator or to accept trial himself.

17 ULPIAN, *Edict, book 9:* After joinder of issue a defendant who has appointed a procurator can certainly change him or transfer the suit from him to himself, even while the procurator is still alive or living in the state, but only after examination of the cause. 1. This is allowed not only to the person who appointed the procurator but also to his heir and other successors. 2. In examination of cause the relevant facts are not only those we mentioned above in connection with not compelling a procurator to undergo trial, but also age

18 MODESTINUS, *Encyclopaedia, book 10:* or the privilege of religion.

19 ULPIAN, *Edict, book 9:* Likewise, if the procurator should be of doubtful character, in prison, or in the power of the enemy or robbers

20 PAUL, *Edict, book 8:* or occupied with criminal or civil proceedings, his health, or more important business of his own

21 GAIUS, *Provincial Edict, book 3:* or exile, or if he should be evasive or later become a personal enemy,

22 PAUL, *Edict, book 8:* or become related by marriage to the other party or be recognized as his heir

23 ULPIAN, *Edict, book 9:* or lengthy absence abroad or other similar causes prove obstacles,

24 PAUL, *Edict, book 8:* a change should be made even at the request of the procurator himself.

25 ULPIAN, *Edict, book 9:* All these principles will be followed not only on the side of the defendant but also on the part of the plaintiff. But if the other party or the procurator himself should say that the principal is lying, this should be settled before the praetor. A procurator ought not to be tolerated who lays claim to a procuratorship for himself; for the very fact that he forces his services on an unwilling recipient makes him suspect. Unless perhaps what he wanted was to put an end to abuse rather than to carry out the duties of a procurator. And then he deserves a hearing only insofar as he says he wants to be rid of the procuratorship but only if it can be done without damage to his reputation. At any rate, we should bear with one protecting his honor. Obviously, if he says he has been appointed in his own interest and has succeeded in proving this, he should not be refused a special action. Likewise, if the procurator wishes to avail himself of some right of retention, the suit should not lightly be transferred from him,

26 PAUL, *Edict, book 8:* unless the principal is prepared to satisfy him.

27 ULPIAN, *Edict, book 9:* In examination of cause, this principle will also operate, that permission for the transference of the trial from the procurator should only be granted if anyone is prepared to transfer everything at issue from him. But if he wants to transfer some of the points at issue but to leave others, the procurator will be right to object to this inconsistency. But this is only the position if the procurator acted on a mandate from a principal. If there is no mandate, since he has brought no special power into the case and you have not given your approval to it, acts done without your permission are no impediment to you, and consequently you do not need the transference of these lawsuits to avoid being incommoded by someone else's action. This examination of the question of replacing the procurator is the duty of the praetor. 1. If transference of suit takes place on the part of the plaintiff, the opinion we give is that the stipulation entered into by the defendant for satisfaction of the judgment is operative. Both Neratius and Julian support this, and it is the law today, certainly if the principal has received security. But even if the procurator has received security and the case is transferred to his principal, it is fairer for the stipulation to be operative and for an action on stipulation to be transferred from the procurator to his principal. But even if the case is transferred from a principal or from a procurator to a procurator, Marcellus has no doubt that the stipulation is operative. This is right. And even though it is the procurator who has brought the stipulation into play, still his principal should be given an *actio utilis* on stipulation, though a straightforward (*directa*) action would be completely out of the question.

28 ULPIAN, *Disputations, book 1:* If my procurator has received security for satisfaction of judgment, I have available an *actio utilis* on stipulation, just as an action on judgment is granted to me. Furthermore, if my procurator has without my permission brought an action on stipulation, nevertheless, an action on stipulation will still be given to me. The consequence of this is that my procurator should be barred from bringing an action on stipulation by a defense (*exceptio*), just as when he brings an action on judgment if he has not been appointed in his own interest or made procurator for this particular purpose. On the other hand, if my procurator has given security for satisfaction of judgment, an action on stipulation is not granted against me. Furthermore, if it is my defender who has given security, an action on stipulation is not granted against me, because an action on judgment cannot be brought against me either.

29 ULPIAN, *Edict, book 9:* If a plaintiff prefers to sue the principal rather than the person who is procurator in his own interest, he should be told that he is free to do so.

30 PAUL, *Views, book 1:* Procurator for the plaintiff, who has not been appointed in his own interest, can demand that the expenses he has been put to for the suit should be met from the action on judgment if his principal is not solvent.

31 ULPIAN, *Edict, book 9:* It will be wrong for anyone who, after being condemned in his capacity as procurator, has become heir to his principal in the suit to object to an action on judgment. This is the position if he is sole heir. If he has become heir to a part only and yet satisfies the whole of the judgment, he will have an action on mandate against his co-heirs, provided that he had a mandate for this too, the satisfaction of judgment. If there is no mandate, an action for unauthorized administration is granted. This is the position also if the procurator did not become heir and yet satisfied judgment. 1. There is no rule against several procurators being appointed for a single lawsuit in which several people are concerned. 2. Julian says that a person who has appointed two procurators at different times is held to have excluded the first by appointing the second.

32 PAUL, *Edict, book 8:* Where several procurators with general powers have been appointed at the same time, the first to act will be given preference, so that a later one does not have the status of procurator in respect of the object of the earlier's claim.

33 ULPIAN, *Edict, book 9:* They say that a slave and son-in-power can also have a procurator. As far as the son-in-power is concerned, it is correct, but with regard to the slave we are doubtful. Certainly, we allow that someone can conduct business connected with the slave's *peculium* and in these circumstances be his procurator (this is Labeo's opinion too);

but we rule out bringing an action. 1. However, we are in no doubt that a person involved in litigation about his status can have a procurator not only in the administration of his affairs but also in the actions which are available either to him or against him, whether it is from a position of servitude or freedom that his litigation on his status is conducted. On the other side, it is also clear that he can be appointed procurator. 2. It is in the public interest for anybody to be able to defend absentees; for the right to defend is granted even in capital crimes. Therefore, in all cases where anyone can be condemned in his absence, it is right to give a hearing to anyone speaking on his behalf and defending his innocence, and it is customary to allow him to appear. This is also clear from a rescript of our emperor. 3. The praetor says: "Subject to reasonable discretion, anyone has the right to defend the person in whose name he asks for an action to be granted him and subject to reasonable discretion he should furnish security to him[1] that the person the matter concerns in whose name he is going to act sanctions his action." 4. The praetor has decided that it is right for the same person who sues as procurator in someone's name also to undertake his defense. 5. If anyone comes into a case as procurator in his own interest, it should be said that he is still under an obligation to defend, unless his appointment happens to have been the result of necessity.

34 GAIUS, *Provincial Edict, book 3:* If anyone sues as procurator in his own interest, for example, the buyer of an inheritance, is he obliged in turn to defend the vendor? The answer is: If the transaction was in good faith and not to defraud those who might want to sue in their turn, he is not obliged in turn to defend.

35 ULPIAN, *Edict, book 9:* But the following classes of procurators who are allowed to sue without a mandate will also be under an obligation to defend, for example, children, even though they are in power, likewise parents, brothers, relations by marriage, and freedmen. 1. A patron can prosecute his freedman for ingratitude through a procurator, and the freedman can answer the charge through a procurator. 2. A procurator will be obliged to defend his absent principal before the appropriate court and in the same province if an application is made not only for an action against him but also for a preliminary enquiry (*praeiudicium*) or interdict, or if security is required by stipulation against danger of loss (*damnum infectum*) or for legacies. But it would be harsh for him also to be compelled to leave Rome for a province or the other way round or one province for another and defend. 3. To defend is to do what a principal would do against an action and to furnish suitable guarantees. The position of a procurator should not be made more difficult than that of his principal except in regard to giving security. Apart from the giving of security, a procurator is considered to offer a defense if he accepts trial. For this reason in Julian the question has been raised whether he should be made to do so or whether the activation of the stipulation for failure to defend be enough. Julian writes in the third book of his *Digest* that he should be made to accept trial unless he has also refused to sue after examination of the case, or has for adequate reason been barred. A procurator is considered to offer a defense even if he allows anyone to enter into possession because he wants security against danger of loss (*damnum infectum*) or for legacies,

36 PAUL, *Edict, book 8:* or in notice of objection to new works. Again if he allows a slave to be seized as the result of a noxal action, he is considered to offer a defense, provided that in all these instances he furnishes guarantees that his principal will ratify his action.

37 ULPIAN, *Edict, book 9:* He is obliged to offer a defense in respect of all actions, even those which are not granted against an heir. Because of this, controversy has arisen where an opponent brings several actions and defendants come forward, each prepared to defend one; Julian says he considers that he is properly defended. Pomponius writes that this is the legal position today.

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1. Better sense is given by Mommsen's emendation which may be translated: "He should furnish security to him against whom he is going to act in another's name that the person the matter concerns sanctions his action."

38 ULPIAN, *Edict, book 40:* However, this principle should not be taken so far that if there is a claim for ten thousand sesterces, two defenders, each prepared to defend a claim for five, should be allowed to do so.

39 ULPIAN, *Edict, book 9:* He is obliged to defend his principal not only in actions, interdicts, and stipulations but also in interrogatories, so that when questioned before the magistrate, he has to reply to all the same questions as his principal. Thus, he will be obliged to answer a question as to whether his absent principal is heir, and he will be liable whether he replies or keeps silent. 1. Anyone bringing an action in someone else's name must guarantee that the person the matter concerns will ratify it. But sometimes, even though a procurator proceeds in his own name, he will be obliged to guarantee ratification, as Pomponius writes in his twenty-fourth book. For example, suppose that an oath has been offered back to a procurator and he has sworn that conveyance is due to his absent principal. He is acting in this case in his own name because the oath is his own (for this procedure could not have been available to his principal), but he will be obliged to guarantee ratification. Again, if an arrangement to pay (*constitutum debiti*) has been made with the procurator and he brings an action rising from it, there should be no doubt that a guarantee of ratification is required, and so Pomponius writes. 2. Julian raises the question: Has he to give security for ratification only as regards his principal or as regards the other creditors as well? His answer is that there need be a guarantee only as regards the principal, and that the words "the person the matter concerns" do not include the creditors. 3. If a father brings an action on dowry, he must guarantee ratification by his daughter. He is also obliged to defend her, as Marcellus too writes. 4. If a father brings an action for insult on his son's account, since there are two actions, one for the father and one for the son, a guarantee of ratification is not required. 5. If a procurator enters into a dispute with anyone over status, whether anyone goes to law with him for the liberty of a slave or whether he himself claims a freeman as a slave, he is obliged to guarantee ratification by his principal. And the Edict lays down that whichever side he takes he should be regarded as plaintiff. 6. There are also circumstances in which both ratification and satisfaction of judgment need to be guaranteed. For example, suppose an examination has been applied for in a case of *in integrum restitutio* where a *minor* is alleged to have been cheated in a sale. A procurator for the other party comes forward. This procurator has to guarantee both ratification by his principal, that he will not want to make any claim on his return, and likewise satisfaction of judgment to insure the handing over of whatever should be handed over to the youth as the result of *in integrum restitutio.* Pomponius too writes to this effect in his twenty-fifth book on the *Edict.* 7. Likewise, he says that at the arraignment of a suspect tutor his defender also ought to guarantee ratification, that he will not want to reopen the case on his return. But permission will not lightly be given for one suspect to be accused through a procurator, since the case involves *infamia,* unless it is agreed that he was expressly given a mandate by a tutor, or if also, in the absence of the tutor, the praetor was going to treat the case as undefended.

40 ULPIAN, *Edict, book 9:* Pomponius writes that not all actions can be brought through a procurator. Accordingly, he says it is not possible for a procurator to apply for an interdict against children, who are alleged to be in the power of his absent principal, being taken away without, as Julian says, examination of the case, that is, if he has been given a specific mandate and the father is prevented by ill-health or some other adequate cause. 1. If a procurator enters into a stipulation against danger of loss or for legacies, he will be obliged to guarantee ratification. 2. Furthermore, a person who is taken to court as a defender in an action *in rem* also has, in addition to the usual security for satisfaction of judgment, to guarantee ratification as well. For if in an action of this sort the verdict is that the thing is mine but the person who had a

defender wants on his return to claim the land as his, surely it will appear that he is not ratifying the judgment? In point of fact, if a proper procurator had come forward or the principal had conducted his own case in person and been beaten, if he were to bring a claim against me, he would be barred by a defense of *res iudicata*, and so Julian writes in the fiftieth book of his *Digest*; for when a thing is judged to be mine, it is at the same time judged not to be his. 3. Security for ratification is taken from a procurator before joinder of issue. Once joinder of issue has taken place, he will not be compelled to give a guarantee. 4. As regards those procurators who do not require a mandate, it should be said that they ought to be debarred if it is clear that they come to court contrary to the wish of those on whose behalf they are intervening. So we do not require that they have consent or a mandate but that there is no proof of a wish to the contrary, even though they offer a guarantee of ratification.

41 PAUL, *Edict, book 9:* Women will sometimes be permitted to take legal action on behalf of their parents, if, say, their parents are prevented by illness or age and do not have a man to do so.

42 PAUL, *Edict, book 8:* Although a procurator cannot be appointed in actions in the public interest, it has, however, rightly been said that a person who goes to law about a public right of way and suffers personal loss from its closure can appoint a procurator for an action that is in some sense private. With even more reason will the person concerned appoint one for an action for the violation of a tomb. 1. A procurator can be appointed for an action for insult under the *lex Cornelia*; for although it is brought in the public interest, it is still a private action. 2. The obligations which usually exist between a principal and his procurator give rise to an action on mandate. However, sometimes the obligations of mandate are not incurred, as happens when we appoint a procurator in his own interest and on this account promise satisfaction of judgment. For if we have paid over anything as the result of this promise, we should bring an action not on mandate but on sale, if we have sold an inheritance or on the original cause of the mandate, as happens when a *fideiussor* (giver of a verbal guarantee) has appointed his principal as his procurator. 3. It is lawful for a person to whom an inheritance has been made over under the *senatus consultum Trebellianum* to appoint the heir as his procurator. 4. It will also be correct for a creditor to appoint the owner of a pledge as his procurator for a Servian action. 5. Further, if an arrangement to pay has been made with one of two responsible for lending and he appoints the other for an action on *constitutum debiti*, we will not deny his right to make the appointment. Also one of two people liable on a promise can appoint the other as procurator for his defense. 6. If there are several heirs and an action is brought for dividing an inheritance or common property, several heirs should not be allowed to appoint the same procurator, since as regards assignments and impositions, a settlement would be impossible. Obviously, the appointment should be allowed if several heirs succeed one of the co-heirs. 7. If a defendant proves evasive after joinder of issue, under the following conditions, it will be considered that his *fideiussores* are defending him, if either one of them defends him for the whole amount or all or any of them have appointed a single person to whom the case will be transferred.

43 PAUL, *Edict, book 9:* The deaf and dumb are not forbidden to appoint a procurator by any method which can be of service. They may also be appointed themselves, not indeed for legal proceedings but for administration. 1. When it is asked whether somebody is allowed to have a procurator, we should look to see whether he is not prevented from appointing a procurator, because the edict is prohibitory. 2. In

actions in the public interest where anyone brings an action as a member of the public, he should not, like a procurator, be compelled to offer defense. 3. Anyone applying for a procurator for a person present will be refused, unless the person, if an adult, gives his consent; if he does so for anyone in his absence, he has to guarantee that he will give his ratification. 4. The penalty for a procurator who will not defend is this, to be refused an action. 5. If a procurator brings an action and a slave of his absent principal is present, Atilicinus says the slave must be given security, not the procurator. 6. A procurator who is not compelled to defend an absent principal, should, however, be compelled to accept trial if he has given security for satisfaction of judgment in order to be allowed to defend the absentee, to prevent the person who accepted security from being misled; for those who are not compelled to defend a case are compelled to do so after the giving of security. Labeo says that a ruling should be given after examination of the case, and if the passage of time brings disadvantage to the plaintiff, he should be compelled to accept trial. But if a marriage relationship has been ended or enmity has arisen or possession has been taken of the property of the absent principal

44 ULPIAN, *Disputations, book 7:* or if he is going to be a long way away or some other adequate reason has come up,

45 PAUL, *Edict, book 9:* he should not be forced to. Sabinus says that compelling defense is no part of a praetor's duties, but an action can be brought under the stipulation for failure to defend, but if he has adequate grounds for refusing to accept trial, his *fideiussores* are not liable, because a good man would be unlikely to judge that a man who put forward adequate justification should be forced to defend. Again, if he has not given security but his word has been accepted, the decision should be the same. 1. Persons who, in bringing an action in a matter of public concern, are also protecting their private interests, are allowed, after examination of the case, to appoint a procurator and anyone else trying to bring an action later on will be barred by a defense (*exceptio*). 2. If an objection to new work has been lodged with a procurator and he avails himself of the interdict against the use of force on him while building, Julian says he takes the role of defendant and does not have to guarantee ratification by his principal, and "if he has furnished security," says Julian, "I do not see under what circumstances the stipulation would be activated."

46 GAIUS, *Provincial Edict, book 3:* If a person who has accepted trial in his own name wants to appoint a procurator so that the plaintiff may bring his case against him, he should be allowed to, and should duly give a guarantee as security for satisfaction of judgment. 1. Someone who defends a man in whose name he does not himself bring an action is free to defend him only on one count. 2. Someone who defends another person has to give security; for no one is considered an adequate defender in an action against someone else unless he gives security. 3. Likewise, it is asked: If a defender has accepted trial and the plaintiff has been awarded *in integrum restitutio*, should he be forced to accept an action for restitution? The prevailing opinion is that he should be. 4. In lawsuits too a procurator must present his accounts in accordance with the principle of good faith, just as in the conduct of other business also. Therefore, in an action on mandate he is obliged to make over what he has obtained from a lawsuit, whether directly and expressly on account of the case or indirectly because of it, so much so that even if he has obtained something not due through a mistake or injustice on the part of the judge, he is obliged to make over this too. 5. On the other hand, he is likewise entitled to recover what he paid out as the result of the judgment, but he is not entitled to recompense for a penalty he incurred because of his own wrongdoing. 6. Fairness suggests that a procurator of either the plaintiff or the defendant should be reimbursed for expenditure on a lawsuit which has been incurred in good faith. 7. If a mandate for management of business has been given to two people of whom one is a debtor of the mandator, would it be right for the other to bring an action against him? It would certainly be right; for he is not deemed to be any the less a procurator because of the fact that the person he brings an action against is also a procurator.

47 JULIAN, *Urseius Ferox, book 4:* If a person who has left two procurators with general

powers over his estate has not expressly directed one to claim money from the other, he is considered not to have given a mandate to either of them.

48 GAIUS, *Provincial Edict, book 3:* Therefore, if a specific mandate for this has been given, then when the defendant introduces the defense, "if I have not been given a mandate to claim from debtors," the plaintiff should counter thus, "or if I have been given a mandate to claim from you."

49 PAUL, *Edict, book 54:* The status of a principal should not, without his knowledge, be made worse through his procurator.

50 GAIUS, *Provincial Edict, book 22:* Whatever the way in which your procurator has been released from an obligation by me, this should benefit you.

51 ULPIAN, *Edict, book 60:* A person offering himself as defender below the age of twenty-five, which can be a reason for awarding him *in integrum restitutio*, is not a suitable defender, because he himself and his *fideiussores* receive help through *in integrum restitutio.* 1. However, since to defend means to undergo the same fate as the defendant, the defender of the husband should not be condemned to pay a larger sum than the husband is able to. 2. A person who has undertaken a defense, even if he is very rich,

52 PAUL, *Edict, book 57:* indeed is of consular rank,

53 ULPIAN, *Edict, book 60:* is not considered to be offering a defense unless he is prepared to give security.

54 PAUL, *Edict, book 50:* Neither a woman nor a soldier nor a person who is going to be away on public business or suffering from a chronic disease or about to take on a magistracy or unable to submit to trial though willing is thought to be suitable as defender. 1. Tutors who have transacted business in any place have also to be defended in the same place.

55 ULPIAN, *Edict, book 65:* If a procurator has been appointed in his own interest, the principal is not to be given preference over the procurator in bringing an action or receiving money; for a person having *actiones utiles* available in his own name is entitled to bring them.

56 ULPIAN, *Edict, book 66:* A procurator appointed to bring a claim for a movable will be entitled to bring an action for production.

57 ULPIAN, *Edict, book 74:* A person who appoints a procurator to bring an action forthwith must be understood also to give the procurator permission to bring it to a conclusion later on. 1. If anyone has foregone the procuratorial defense, he will not be able to change his mind and raise it as an objection.

58 PAUL, *Edict, book 71:* A procurator who has been entrusted in general terms with an unrestricted power to administer an estate can demand payment, make novations, and exchange one thing for another.

59 PAUL, *Plautius, book 10:* Indeed, it is considered that he has also been given a mandate to pay creditors.

60 PAUL, *Replies, book 4:* A general mandate does not also cover a compromise introduced to effect a settlement, and for this reason, if the mandator has not afterward ratified the compromise, he cannot be barred from bringing actions.

61 PAUL, *Plautius, book 1:* Plautius says: "All are of the opinion that a procurator who has suffered condemnation should not be sued, unless he was appointed in his own interest or came forward although he knew no guarantee had been given. The same principle will apply also if he has come forward with security as defender in a lawsuit."

62 POMPONIUS, *From Plautius, book 2:* If a procurator appointed to claim a legacy makes use against the heir of the interdict for the production of a will, he is not stopped by a procuratorial defense, made on the ground that he has not also been given a mandate for this.

63 MODESTINUS, *Differences, book 6:* A procurator for the whole of an estate who has been given a mandate for its administration cannot, without a specific mandate from his principal, alienate his principal's property whether movables, immovables, or slaves, apart from fruits or other things which can easily spoil.

64 MODESTINUS, *Rules, book 3:* If a person in whose name a defender has come forward has appeared in court before joinder of issue and applies to take on the suit in his own name, his request should be granted after examination of the case.

65 MODESTINUS, *Advice on Drafting, sole book:* If a principal wishes to free an absent procurator from the need to give security, he will have to send a letter to his opponent in which he makes clear whom he has made procurator against him and in which case and that he will ratify the result of the action with him. For under these circumstances, once the letter has been accepted, the procurator should be considered to have the same standing in the case as if his principal were present. Therefore, even if afterward he changes his mind and does not want him as procurator, yet he is obliged to ratify the action in which he acted as procurator.

66 PAPINIAN, *Questions, book 9:* If a person who has taken by stipulation a promise of Stichus or Dama at his own option also ratifies a claim for one of them by Titius acting as his procurator, the result is that it is considered that the matter has been brought into court and he uses up his stipulation.

67 PAPINIAN, *Replies, book 2:* A procurator who has given a guarantee against a successful claim for property which he has sold, even if he has ceased to act as agent, will still not receive the praetor's help to free him from the burden of his obligation; for it is in vain that a procurator who has taken on the bond of an obligation on his principal's behalf tries to rid himself of his burden.

68 PAPINIAN, *Replies, book 3:* A principal cannot without his procurator's consent claim what, in accordance with the terms of his mandate, the procurator stipulated for in connection with his principal's affairs.

69 PAUL, *Replies, book 3:* Paul replied that a man who appointed a procurator to take on a lawsuit was still not prevented from appearing in his own case.

70 SCAEVOLA, *Replies, book 1:* A father has appointed Sempronius, his creditor, as tutor to his son, a *pupillus*. Sempronius after carrying on the tutelage left his brother as his heir. The brother himself also died and by a *fideicommissum* left the debtor's account to Titius and actions were mandated to him by the heirs. The question is: Since the inheritance of Sempronius gives rise to an action on tutelage as well as to one on loan, should a mandated action only be granted him if he defends the heirs by whom the actions were mandated to him? I replied that he is obliged to defend.

71 PAUL, *Views, book 1:* An absent defendant can give the reasons for his absence through a procurator.

72 PAUL, *Handbook, book 1:* We do not always acquire actions through a procurator, but retain them, for example, if he sues a defendant within the statutory time, or if he forbids new works being done so that an *interdictum utile* against force or stealth is available to us; for here too he preserves our existing rights.

73 PAUL, *The Duties of Assessors, sole book:* If a defendant is prepared to make payment before joinder of issue, what should happen when a procurator is bringing the action? Would it be unfair for him to be forced to accept an action which would make him appear of doubtful character since he did not offer the money when the principal was present? But if he did not have the money available then, should he be compelled to accept trial? For what if the action also involves *infamia*? But this is agreed, that before joinder of issue the governor should order the money to be deposited in a temple; for this is done with the monies of *pupilli* as well. But if joinder of issue has taken place, it is the judge's duty to settle all this.

74 ULPIAN, *Opinions, book 4:* The advocate of a state cannot perform public business through a procurator.

75 JULIAN, *Digest, book 3:* A person defending an absent purchaser and also possessor of a piece of land and accepting trial in his name requested the seller of the land to defend him. The seller wanted a guarantee that the buyer would give his ratification. In my opinion, he ought to give the seller security for ratification because if he restored the land to the plaintiff, nothing prevents his principal from claiming it and the seller from again being forced to defend.

76 JULIAN, *From Minicius, book 5:* When Titius was defending an absent principal, he furnished security; and before he accepted trial, the defendant became insolvent. Because of this the defender objected that an action should not be granted against him. The question is whether this should be agreed to. Julian replied: "Once a defender has furnished security, he should be considered as in the position of his principal. And the praetor is not going to help him much if he does not force him to accept trial, since recourse can be had to his *fideiussores* and whatever these pay out, they are going to get from the defender."

77 PAUL, *Edict, book 57:* Everyone who is defended should be defended with honest intent.

78 AFRICANUS, *Questions, book 6:* And for this reason a person is not considered to defend a lawsuit with honest intent when, by putting off the plaintiff, he prevents the dispute from being brought to a conclusion. 1. If a procurator, appointed to claim two things, claims only one, he cannot be stopped by a defense (*exceptio*), and succeeds in bringing the matter into court.

4

ACTIONS IN THE NAME OF OR AGAINST ANY CORPORATE BODY

1 GAIUS, *Provincial Edict, book 3:* Partnerships, *collegia*, and bodies of this sort may not be formed by everybody at will; for this right is restricted by statutes, *senatus consulta*, and imperial *constitutiones*. In a few cases only are bodies of this sort permitted. For example, partners in tax farming, gold mines, silver mines, and saltworks are allowed to form corporations. Likewise, there are certain *collegia* at Rome whose corporate status has been established by *senatus consulta* and imperial *constitutiones*, for example, those of the bakers and certain others and of the shipowners, who are found in the provinces too. 1. Those permitted to form a corporate body consisting of a *collegium* or partnership or specifically one or the other of these have the right on the pattern of the state to have common property, a common treasury, and an attorney or syndic through whom, as in a state, what should be transacted and done in common is transacted and done. 2. For if no one defends them, the proconsul says

that he will order what they have in common to be seized and, if after warning they are not roused to defend their property, to be sold. Furthermore, we consider that there is no attorney or syndic on occasions also when he is away or prevented by ill-health or not qualified to act. 3. And if an outsider wants to defend the corporation, the proconsul allows it, as is the practice in the defense of individuals, because this improves the position of a corporation.

2 ULPIAN, *Edict, book 8:* If members of a municipality or any corporate body appoint an attorney for legal business, it should not be said that he is in the position of a man appointed by several people; for he comes in on behalf of a public authority or corporate body, not on behalf of individuals.

3 ULPIAN, *Edict, book 9:* No one is allowed to appear in court in the name of a state or council except a person permitted to do so by law or, when the law is silent, appointed by the decurions when two thirds or more were present.

4 PAUL, *Edict, book 9:* Obviously, to make up the two thirds of the decurions, the man they are going to decide on can also be counted.

5 ULPIAN, *Edict, book 8:* Pomponius says that the following point should be noted, that a father's vote will count for his son and a son's for his father,

6 PAUL, *Edict, book 9:* likewise, the votes of those who are in the power of the same person; for he casts this vote as a decurion, not as a member of a family. This principle should also be observed in elections to office, unless a law of the municipality or a long-standing custom prevents it. 1. If the decurions have decreed that an action is to be brought through a person chosen by the *duumviri*, it is considered that this person has been chosen by the decurions, and for this reason he can appear in court; for it matters little whether the decurions themselves made the choice or the man to whom they gave the task. But if they have made a decree in the following terms—that whatever dispute occurs, Titius is to have the task of claiming its object—this decree is automatically null and void, because it cannot be held that a decree has given the power to sue in respect of a thing which is still not in dispute. But nowadays all this is usually settled through syndics in accordance with local custom. 2. If an attorney has been appointed and afterward ordered to stop proceedings by the decurions, would a defense (*exceptio*) be effective against him? In my opinion, this situation should be interpreted as follows: A thing should be considered to have been entrusted to a person only for as long as it continues to be entrusted. 3. If the attorney of a corporate body sues, he is compelled also to defend, but he is not compelled to guarantee ratification. But sometimes if there is doubt about a decree, I think a guarantee of ratification should also be brought in. So the attorney plays the part of a procurator, and in accordance with the edict an action on judgment is not granted him unless he was appointed in his own interest. Arrangements for payment can also be made with him. An attorney can be replaced for the same reasons as a procurator also. A son-in-power can also be appointed as attorney.

7 ULPIAN, *Edict, book 10:* Just as the praetor has granted an action in the name of members of a municipality, so he thought that in justice proceedings should also be allowed against them. Again, in my opinion, a legate who has been put to some expense on public business should be granted an action against members of a municipality. 1. A debt to a corporate body is not a debt to individuals and a debt of a corporate body is not a debt of individuals. 2. As regards decurions or other corporate bodies, it does not matter whether all the members remain the same or only some or

whether all have changed. But if a corporate body is reduced to one member, it is usually conceded that he can sue and be sued, since the rights of all have fallen to one and the corporate body continues to exist in name only.

8 JAVOLENUS, *From Cassius, book 15:* If states are not defended through the agency of those who manage their affairs and there is no material thing in public ownership which may be seized, those bringing suit should be given satisfaction by means of actions for the state's debts.

9 POMPONIUS, *Sabinus, book 13:* If you share an inheritance with the members of a municipality, an action for dividing it is granted between you. The same thing should be said as regards a suit for regulating boundaries and one for warding off rainwater.

10 PAUL, *Handbook, book 1:* An attorney can also be appointed to give notice of objection to new works and to introduce stipulations, for example, for legacies, danger of loss, and satisfaction of judgment, although guarantees ought rather to be given to a slave belonging to the state. But even if the guarantee has been given to the attorney, an *actio utilis* will be given to the administrator of the state's business.

5

UNAUTHORIZED ADMINISTRATION

1 ULPIAN, *Edict, book 10:* This edict is essential, since it is concerned with a matter of great importance to absentees, that they should not, through want of a defense, suffer the seizure or sale of their property, the disposal of a pledge or an action for incurring a penalty, or lose their property unjustly.

2 GAIUS, *Provincial Edict, book 3:* If any man has managed the affairs of an absentee, even though it is without his knowledge, he still has an action for whatever he has spent beneficially on his business, and also for any obligation he has taken upon himself in furtherance of the business of the absentee. As a result, this situation gives rise to an action on both sides, which is called an action for unauthorized administration. And clearly, just as it is right for the agent to give an account of his activity and to be condemned for whatever he either has not dealt with as he ought to have or keeps for himself from these transactions, so, on the other hand, it is just that if his administration has been beneficial, he should be reimbursed for any loss he has suffered or is going to suffer on this account.

3 ULPIAN, *Edict, book 10:* The praetor says: "If anyone has managed the affairs of another or has administered what were his affairs at the time of his death, I will grant a trial on this account." 1. The words "if any man" must be taken to include "or if any woman"; for there is no doubt that women too can bring and be the object of actions for unauthorized administration. 2. "Affairs" must be taken to mean either one or more transactions. 3. He says "of another," and this is taken to refer to both sexes. 4. Obviously, if a *pupillus* has been the administrator, following a rescript of the deified Pius, he also can be sued for any gain he has made, while, when he brings an action, it is offset against what he has done. 5. Even if I have administered the affairs of a lunatic, an action against him for unauthorized administration is available to me, while Labeo says that the curator of a lunatic, male or female, should be given an action against him or her. 6. The words "or if anyone has administered what were anyone's affairs at the time of his death" refer to the time in which anyone has administered somebody's affairs after his death. It was necessary to give a ruling on this point since the affairs he has administered do not appear to be those either of the testator, who is already dead, or those of the heir who has not yet accepted. Further, if any increase has occurred after death, for example, offspring, progeny, fruits, or anything acquired by slaves, even if they are not covered by these words, they must still count as an addition. 7. This action, since it arises from the transaction of a piece of business, is available both to and against the heir. 8. If an officer of the court

appointed by the praetor in connection with a piece of business of mine has practiced fraud upon me, an action against him will be given me. 9. Labeo writes that sometimes an action for unauthorized administration is concerned only with fraud; for if, under the impulse of affection, you have intervened in my affairs to prevent some of my property being sold, the fairest thing is for you to be liable only for fraud. There is justice in this view. 10. It is not only the man who has involved himself in and administered another's affairs of his own free will and under no compulsion who is liable to this action but also the man who has administered them because for some reason he had to or thought he had to. 11. In the works of Marcellus, in the second book of his *Digest*, it is asked, if after I had decided to administer Titius's affairs, you gave me a mandate to do so, whether I could make use of either action. My opinion is that either action is available. Marcellus himself writes to the same effect, if I acquire a guarantor (*fideiussor*) when about to begin some transaction; for he says that here too an action is available against either.

4 ULPIAN, *Sabinus, book 45:* But let us consider whether the guarantor can have an action here. In fact, it is right that he should be able to bring an action for unauthorized administration, unless he intended to make a gift of his services.

5 ULPIAN, *Edict, book 10:* Likewise, if I have transacted business under the impression I had a mandate from you, this situation too gives rise to an action for unauthorized administration, since an action on mandate is not available. The position is the same too if I give a verbal guarantee while under the impression that I have a mandate from you. 1. Again, if I transacted business under the impression it was Titius's when it was Sempronius's, only Sempronius is liable to an action by me for unauthorized administration. 2 (6). Julian in the third book of his *Digest* writes that if I have administered the affairs of your *pupillus*, not on your mandate but to prevent your being liable to an action on tutelage, you will be subject to an action by me for unauthorized administration, but your *pupillus* also only if he has been made richer. 3 (1). Likewise, if I have given a loan to your procurator for your sake, to satisfy your creditor or to redeem your pledge, I shall have an action for unauthorized administration against you, but no action against the man I made the arrangement with. What, however, is the situation if I took a stipulation from your procurator? It can be said that an action against you for unauthorized administration remains to me because the stipulation I brought in was superfluous. 4 (2). If anyone took on the task of conveying money or some other thing to me, because he performed business of mine, an action for unauthorized administration against him is available to me. 5 (3). Again, if anyone has transacted business of mine not for my sake but for his own profit, Labeo has written that he has transacted his own rather than my business (for a man who comes to it in order to rob is after his own profit rather than my advantage) but nevertheless, in fact to a greater extent, will he too be liable to an action for unauthorized administration. However, on his side, if he has been put to some expense with regard to my affairs, he has an action against me not for the amount of his loss, because he came to my business with dishonest intent, but for the amount I have been made richer. 6 (4). If anyone has behaved so foolishly as to transact business of his own to do with his own property thinking it to be mine, no action arises on either side, because good faith does not allow it. But if he has transacted business of his own and mine thinking it to be mine, he will be liable for mine; for even if I have given anyone a mandate to transact business of mine which I had in common with you, Labeo says it should be stated that if your business was also knowingly transacted, he is liable to an action by you for unauthorized administration. 7 (5). If anyone has transacted business of mine because he thought he was my slave, although he was either a freedman or free born, he will be given an action for unauthorized administration. 8 (6). But if I have transacted business of your son or slave, let us consider whether I have an action against you for unauthorized administration. In my opinion, the distinction, which Labeo makes and Pomponius, in his twenty-sixth book, supports, is correct, that if I transacted business to do with their *peculia* with you in mind, you are liable to me, but if out of friendship to your son or slave or with them in mind, then an action given against father or master should be limited to the amount of the *peculium*. The position is the same

even if I thought them to be independent. For even if I have bought a slave for your son when there was no need and you have ratified it, Pomponius writes in the same passage the ratification has no effect, though with this qualification: He thinks even if there is nothing in the *peculium* because more is due to the father or master, that an action should still be given against the father for the amount by which he has been made richer as the result of my transaction. 9 (7). But if I have transacted business of a freeman who in good faith was conducting himself as your slave, if my transaction was carried out under the impression that he was your slave, Pomponius writes that I will have an action for unauthorized administration against you for those contents of the *peculium* which should belong to you, but an action not against you but against the man himself for those contents of the *peculium* which belong to him. But if I knew he was a freeman, I shall have an action against him for the things which belong to him, but against you for the things which belong to you. 10 (8). If I have given money to prevent the death of a slave under the impression that he belonged to Titius when he belonged to Sempronius, I shall have an action for unauthorized administration against Sempronius. 11 (9). Likewise, in the seventh book of Pomponius's work the question is raised, if I gave Titius a reminder out of court thinking him to be your debtor and he paid me, although he was not a debtor, and you afterward got to know and ratified it, could you take me to court with an action for unauthorized administration? He says there is room for doubt because no business of yours was transacted, since he was not your debtor. "But," he says, "ratification made the business yours," and just as he from whom payment was exacted is given the power to reclaim from the person who ratified the transaction, so also ought the latter to have an action available against me after ratification. So ratification will make a business yours which initially was not yours, but was done with you in mind. 12 (10). He says the same if I have in similar fashion taken to court and exacted payment from a debtor of Titius under the impression that you were his heir, although Seius was, and you have ratified my action, namely that each of us has an action for unauthorized administration against the other. It is true that it was someone else's business which was transacted, but ratification takes care of this; it causes the business transacted to be considered yours and enables you to make a claim for the inheritance. 13 (11). "Well then," says Pedius, "if, because I thought you heir, I shored up a tenement belonging to the inheritance and you gave your ratification, would I have an action against you?" In fact, he says I would not have, since someone else has been enriched by this action of mine and the business transacted was really someone else's, and what was from the very nature of the transaction another's gain cannot be considered your business. 14 (12). As regards the duty of an agent, if he has done certain things but not others, while because of him someone else has not taken on the latter things, and if a careful person (and this is what we demand of him) would have done these also, should it be said that he is liable to an action for unauthorized administration for what he has not done as well? In my opinion, this is the more reasonable view. Certainly, if he should have exacted any payment from himself, this will without doubt be brought against him. For although he cannot be charged with not suing other debtors, since he did not have the power to take them to court when there was no action he had the power to bring, still he will be charged with not exacting payment from himself, and if, say, the debt did not bear interest, it begins to be interest-bearing, as the deified Pius said in a rescript to Longinus, unless perhaps, he said, he had forgone interest,

6 (7) PAUL, *Edict, book 9:* because in actions of good faith the exercise of his powers by the judge carries as much weight as a question expressly about this thing does in a stipulation.

7 (8) ULPIAN, *Edict, book 10:* If the administrator was one for whom a mandate was not required, he can be charged with not giving a guarantee of ratification and taking him to court, provided that it would have been easy for him to furnish security. Certainly, this is unquestionable in his own case, and for this reason, if his obligation had a time limit and he has been released from it by the passage of time, he will nevertheless be subject to an action for unauthorized administration. The same thing will have to be said also with respect to a case where the heir would not be liable, as Marcellus writes. 1. Likewise,

if, while acting as administrator for you or the state, I made a fraudulent claim for land as yours or the state's and obtained more of the fruits than I should have, all this will have to be handed over to you or the state, even though I had no right to make the claim. 2. If for any reason the judge has not taken account of a set-off, a cross-action (*actio contraria*) can be brought. But if the compensatory claims have been rejected after consideration, it is better not to allow any further pleadings by means of a cross-action on the ground that the matter has been already decided in court, because a defense of *res iudicata* ought to be interposed. 3. Julian, in his third book, discusses the question, if of two partners one has forbidden me to act as administrator and the other has not, whether I should have an action for unauthorized administration against the one who did not forbid. He is influenced by the argument that if an action is granted against him, the man who forbade will of necessity also be affected, but he thought too that it is unfair for the man who did not forbid to be freed from liability by another's act when, even if I had given a loan to one of two partners in spite of his partner's prohibition, I would certainly have placed him under an obligation. My opinion, in accordance with that of Julian, is that it should be said that there is an action for unauthorized administration against the man who did not forbid, but only on condition that the man who did forbid does not suffer a loss of any sort either through his partner or directly.

8 (9) SCAEVOLA, *Questions, book 1:* Pomponius writes that if I have given my approval to a transaction by you however badly it has been carried out, you are still not liable to an action by me for unauthorized administration. Care must be taken therefore that an action for unauthorized administration does not hang upon uncertainty about whether I gave my ratification. For when once it arises, how will it be removed by an unexpressed meaning? However, he writes above that he thinks this view correct, provided that there is no fraud on your part. SCAEVOLA: I think on the contrary that even if I give my approval, an action for unauthorized administration is still possible, though it has been said that you are not liable to me insofar as I cannot reject what I have once accepted, and that just as before the judge a transaction in the interests of the principal must be taken as ratified, so must everything to which the principal has given his approval. But if no action for administration is possible after I have given my approval, what will happen if he has exacted payment from my debtor and I have given my approval? How shall I recover my money? Likewise, what if he has made a sale? Finally, if he himself has spent anything, how will he recover it? For he certainly has not been given a mandate. Even after ratification, therefore, an action for unauthorized administration will be possible.

9 (10) ULPIAN, *Edict, book 10:* But am I given an independent action for expenses I have been put to? In my opinion, one is available unless provision has been specifically made that neither should have an action against the other. 1. A person who brings an action for unauthorized administration will have the use of that action not only if he was successful in the business he transacted, but it is enough that he acted beneficially, even if what he did was unsuccessful. For this reason, if he shored up a tenement or took care of a sick slave, even if the tenement was burned down or the slave died, he will bring an action for unauthorized administration. Labeo too supports this view, but, as Celsus reports, Proculus in a note on Labeo says that the action should not always be granted. For what if he shored up a tenement which the owner abandoned because he was unequal to the expense, or which he thought he did not need? "He has," he says, "according to Labeo's view placed a burden on the owner, since everyone is allowed, even on account of threatened damage (*damnum infectum*), to abandon a thing." But that view Celsus neatly ridicules. "For," he says, "it is the man who has administered beneficially who has an action for unauthorized administration, but he who undertakes a thing which is not necessary or going to be a burden on the head of the household is not administering beneficially." What Julian writes is also to the same effect, that the person who shored up the tenement or looked after the sick slave has an action for unauthorized administration if he did this beneficially, even though a successful outcome did not follow. My question is: What if he thought he was acting beneficially, but it was not to the advantage of the head of the household? I say that this man will

not have an action for unauthorized administration; for although we do not regard the outcome, the beginning must be beneficial.

10 (11) POMPONIUS, *Quintus Mucius, book 21:* If you act as the agent of a person who is absent and in ignorance, you have to answer for both negligence and fraud. But Proculus says that sometimes you have to answer for accident as well, for example, if in the name of your absentee principal you transact business he did not usually do, for example, buying newly imported slaves at a sale or entering into some other business deal. For if any loss comes from this, it will come to you, but a profit to the absent principal. However, if there has been a profit in some transactions and a loss in others, the absent principal has to set off the profit against the loss.

11 (12) ULPIAN, *Edict, book 10:* This action should be given to the successor of a principal who has died at the hands of the enemy. 1. But an action will similarly have to be given if I have administered the affairs of a son-in-power who died on military service after making a will. 2. Just as in administering the affairs of the living, beneficial administration in the principal's interest is enough, so also with the property of the dead, even though the outcome that followed is of a different kind.

12 (13) PAUL, *Edict, book 9:* My debtor, who owed me fifty thousand sesterces, died. I took on the superintendence of this inheritance and spent ten thousand sesterces on it. Then, I lodged in a place of safety one hundred thousand sesterces received from the sale of a thing belonging to the inheritance. This money was lost through no fault on my part. The question is whether I can claim either the fifty thousand sesterces on loan or the ten thousand I spent from the person eventually recognized as heir. Julian writes that the answer depends on our ascertaining whether I had an adequate reason for depositing the one hundred thousand. For if I ought to have paid both myself and the other creditors of the inheritance, I shall be responsible not only for the sixty thousand but also for the remaining forty thousand, but shall keep the ten thousand which I spent, that is, only ninety thousand have to be repaid. On the other hand, if there was an adequate reason for keeping the one hundred thousand untouched, for example, if there was a danger of land being forfeited to the state, of the penalty in a loan on bottomry being increased, or of a penalty being incurred as the result of an agreement to settle by arbitration (*ex compromisso*), I can get from the heir not only the ten thousand which I spent on the affairs of the inheritance but also the fifty thousand owing to me.

13 (14) ULPIAN, *Edict, book 10:* In a case where a son-in-power is supposed to have acted as unauthorized agent, the fairest thing will be for an action to be given against the father as well, whether the son has a *peculium* or whether he benefits his father. Similarly, in the case of a female slave.

14 (15) PAUL, *Edict, book 9:* Pomponius in his twenty-sixth book says that in cases of unauthorized administration, it is status at the beginning of any period that should be looked to. "For what," he says, "is the situation if I began by acting as the unauthorized agent of a *pupillus* and amid the delays he reached puberty? Or of a slave or son-in-power and in the meanwhile he became free or head of a household?" I too have discovered that this is the more reasonable view unless I came in initially with the intention of carrying out only one piece of business and then went on to another with altered attitude at a time when the principal has already reached puberty or become free or head of a household; for here there have been, as it were, several cases of unauthorized administration, and the action is framed and the condemnation modified in accordance with the status of the persons involved.

15 (16) PAUL, *Plautius, book 7:* Again, when someone transacts business of mine, it is not a number of transactions but a single obligation, unless initially he took on only one transaction with the intention of getting out on its completion. For in this case, if he makes a fresh decision to tackle another as well, it is a different obligation.

16 (17) ULPIAN, *Edict, book 35:* A person who has been manumitted does not have to account for an act which he performed in servitude. Obviously, if there was any continuity, so that an account of what was done in servitude cannot be kept separate from what was done in a state of freedom, it is agreed that what was done in servitude also comes into a trial on mandate or for unauthorized administration. Accordingly, if he bought a plot of ground during his period of servitude, built a tenement on it and this collapsed, if he then after manumission leased the site, only the leasing of plots will be brought in during a trial for unauthorized administration, because nothing can be brought in from the previous period of his management except what is necessary for explaining business transacted during his time of freedom.

17 (18) PAUL, *Edict, book 9:* Proculus and Pegasus say that a man whose agency begins during his servitude is required to show good faith, and for this reason in an action for unauthorized administration, the agent who has not taken payment from himself will be liable for as much as his principal would have got if someone else had administered his affairs, provided the agent had something in his *peculium* by the retention of which this can be obtained. Neratius says the same.

18 (19) PAUL, *Neratius, book 2:* And yet he was morally a debtor even if he had nothing in his *peculium*, and if later he did have, he ought later to pay it over to himself in continuance of the same transaction, just as a person liable to an action with a time limit, is compelled by an action for unauthorized administration to accept the liability even after the time has run out. 1. Our Scaevola says that what Sabinus writes about the obligation to render an account from the beginning means this: that it should be made clear what was due at the moment when he became a free man, not that he should make himself liable for fraud or negligence committed during his servitude. So, even if it is discovered that he has spent money dishonestly during his servitude, he will be freed from liability. 2. If I give a mandate for some transaction to a freeman who genuinely thought he was my slave, Labeo says I will not have an action on mandate against him because he does not carry out the thing mandated to him of his own free will but in a way as a slave under compulsion. I shall then have an action for unauthorized administration, because he both had the intention of transacting business of mine and was the sort of person I could put under a legal obligation. 3. Suppose that when, in my absence, you were managing my affairs, you unwittingly bought a thing belonging to me and ignorantly usucapted it; you are not liable to an action for unauthorized administration by me for its restoration. But if, before usucaption is complete, you discover the thing is mine, you should bring in someone to claim it from you in my name, so that he may get the thing for me and activate the stipulation against dispossession for you. And it is not thought that you are acting fraudulently in bringing someone in in this way; for you are obliged to do it to avoid an action for unauthorized administration. 4. As the result of a trial for unauthorized administration, we shall hand over not only capital but also the interest received on the other person's money or even interest which we could have collected. On the other hand too, we shall obtain by means of a trial for unauthorized administration interest we have paid out or interest which we could have received on money of our own which we spent on the other person's business. 5. While Titius was in the hands of the enemy, I

managed his affairs. Later he returned. An action for unauthorized administration is available to me even though at the time of my management there was no principal.

19 (20) ULPIAN, *Edict, book 10:* But if he died while in the hands of the enemy, a direct (*directa*) action and cross-action (*actio contraria*) for unauthorized administration are available to and against his successor.

20 (21) PAUL, *Edict, book 9:* For Servius too replied, as reported in Alfenus in the thirty-ninth book of his *Digest,* that when three men had been captured by the Lusitanians and one had been released on condition that he brought money for the three of them and that if he did not return, the other two would give money for him as well, and when he had refused to return and because of this they had paid money for the third man as well, Servius replied that it was right for the praetor to grant an action against him. 1. He who manages the affairs of an inheritance in a way puts the inheritance under a legal obligation to himself and himself under one to the inheritance. For this reason, it does not matter whether the heir turns out to be still a *pupillus,* because this debt passes to him together with the other burdens on the inheritance. 2. If I began to manage Titius's affairs during his lifetime, I ought not to leave off at his death. However, there is no necessity for me to enter into new transactions, though it is necessary to complete and look after old ones. It is the same as when one of two partners has died; for as regards any transactions to complete previous business, the issue is not when these are finished, but when they were begun. 3. Lucius Titius has managed my affairs on a mandate from you. With regard to his mismanagement, you are liable to an action by me for unauthorized administration to make you not only cede your rights to actions to me but also reimburse me for whatever damage he has caused by his negligence, since you were unwise enough to choose him.

21 (22) GAIUS, *Provincial Edict, book 3:* Anybody who, in the course of managing the affairs either of an inheritance or of a person, has bought a thing from necessity will be able, even though it has been destroyed, to get what he spent by means of an action for unauthorized administration, for example, if he has purchased corn or wine for the household and it has been destroyed by some accident such as a fire or the collapse of a building. But obviously, this can only be said if the actual fire or collapse happened through no fault on his part; for where he ought to be condemned on account of the actual collapse or fire, it would be ridiculous for him to get anything on account of the things destroyed in this way.

22 (23) PAUL, *Edict, book 20:* Anyone who, in the course of managing someone else's affairs, has exacted a payment not due is compelled to give it back, but as regards a payment made when not due, the better opinion is that he ought to charge it to himself.

23 (24) PAUL, *Edict, book 24:* If I give money to a procurator intending this actual money to go to a creditor, ownership is not acquired through the procurator, but the creditor can make the money his own, even against my wishes, by giving his ratification, because the procurator in receiving the money only acted as the agent of the creditor, and this is the reason why I am freed from liability by the creditor's ratification.

24 (25) PAUL, *Edict, book 27:* Anyone who, in the course of managing someone else's affairs has spent more than he should will recover what he ought to have spent.

25 (26) MODESTINUS, *Replies, book 1:* In a case where instructions had been given for an inheritance to be made over under a *fideicommissum* to some state, the magistrates appointed Titius, Seius, and Gaius as suitable managers of the property. Afterward these managers divided up the administration of the property among

themselves, and they did this without the authority and without the consent of the magistrates. After some time, the will in which there was the *fideicommissum* to make over the inheritance to the state was proved invalid in court, and so on intestacy Sempronius came forward as the *legitimus heres* of the deceased. But one of the managers died insolvent, and no heir came forward. My question is: If Sempronius goes to law with the managers of this property, on whom does the liability of the man who died in poverty fall? Herennius Modestinus replied that what cannot be got by an action for unauthorized administration from one of the managers on account of transactions in which he alone was concerned, becomes the loss of the man who claimed his statutory inheritance (*legitima hereditas*).

26 (27) MODESTINUS, *Replies, book 2:* In a case where two brothers, one of full age and the other younger, had land in the country in common, the older brother had put up extensive buildings on their common estate, which had dwellings erected by previous generations, and when he was dividing up the estate with his brother, he made a claim for expenses on the ground that he had made improvements to the property. His brother by now had attained the statutory age. Modestinus replied that the subject of the inquiry had no action on account of expenses which had been incurred, not under the pressure of circumstances, but in pursuit of pleasure. 1. I replied that if Titius supported his sister's daughter from a sense of duty, he did not have an action against her on this account.

27 (28) JAVOLENUS, *From Cassius, book 8:* Anyone who has managed the affairs of Seius on a mandate from Titius, is liable to an action on mandate by Titius and damages should be assessed at the amount Seius and Titius stand to lose. Titius stands to lose the amount he has to pay Seius to whom he is legally bound by way either of mandate or unauthorized administration. Titius has an action available against the person to whom he mandated the management of someone else's affairs and that before he himself pays anything to his principal because he is deemed to have lost the amount of his liability.

28 (29) CALLISTRATUS, *Monitory Edict, book 3:* Where a father has in his will appointed a tutor for a posthumous child and he has exercised tutelage in the intervening period and a posthumous child has not been born, an action against him should be not on tutelage but for unauthorized administration. But if a posthumous child has been born, the action will be one on tutelage and both periods of his management will come into it, the one before the birth of the *infans* and the one after his birth.

29 (30) JULIAN, *Digest, book 3:* A problem from real life. A certain man was appointed by a decree of the town council as curator to buy top quality wheat; someone else, appointed as his assistant, lowered its quality by admixture, and so the curator received a reduced price for the wheat bought for the state. By what action could the curator get his assistant into court and succeed in recouping the loss he suffered because of him? Valerius Severus said in a reply that an action for unauthorized administration should be given to a tutor against a fellow tutor. He also said that the same action should be given to a magistrate against a fellow magistrate, always provided that he is not privy to fraud. Following these precedents the same thing should be said also in the case of the assistant curator.

30 (31) PAPINIAN, *Replies, book 2:* He gave a mandate to a freedman or friend to raise a loan. In accordance with his letter, a creditor was found and a guarantor brought in. Even if the money has not been turned over to him, yet an action against him for unauthorized administration will be granted to the creditor or guarantor, obviously on the analogy of the action for a business manager's conduct (*actio institoria*). 1. While transacting business of Sempronius, he inadvertently transacted that of Titius. He will be answerable to Sempronius on this account also, but the judge must see to it that he gets a guarantee against financial loss with respect to Titius, who is entitled to an action. The law is the same in the case of a tutor. 2. A case which had come into court had been abandoned by the defendant. A friend of the defaulter went on with it of his own accord, giving the judge reasons for his absence. The friend will not be held guilty of negligence for not appealing when the verdict went against the absentee. ULPIAN in a note: This is right, because the one condemned was the defaulter. But if the friend had been condemned when defending an absentee and brings an action for unauthorized administration, it will be possible to criticize him if he did not appeal when he was able to. 3. The manager of another's affairs has to take

responsibility for payment of interest, that is, of course, on money remaining after necessary expenses have been cleared. 4. A testator left instructions in his will that his freedmen were to get a specified sum of money to pay for a monument. If more has been spent, it will be wrong to claim it from the heir by bringing an action for unauthorized administration or under the *fideicommissum*, since the will set a limit on expenditure. 5. A tutor's heir, his son below the age of puberty (*impubes*), is not answerable for what his own tutor has done in the affairs of his father's *pupillus*, but the tutor will be taken to court in his own name by means of an action for unauthorized administration. 6. Although a mother, relying on her sense of what is fitting, may manage her son's affairs in accordance with his father's wishes, yet she will not have the right to appoint counsel to engage in lawsuits at her risk, because she herself does not have the right to litigate, to alienate items of his property, or to discharge a debtor of the *impubes* by receiving his money. 7. Where one man defends a common right to water, the land is the recipient of the judgment, but the person incurring necessary and allowable expenses in a common cause has an action for unauthorized administration.

31 (32) PAPINIAN, *Replies, book 3:* A guarantor (*fideiussor*) made a mistake through inexperience and took up the *pignora* or *hypothecae* of a second agreement, for which he had no responsibility, and paid both sums of money to the creditor, thinking that it was possible to avoid financial loss to himself by uniting the plots of ground. An action on mandate against him because of these transactions will fail, and so will one by him against the debtor. Each will need to bring an action for unauthorized administration. In a case of this sort, it is sufficient to assess damages due to negligence without those due to accident as well, because a *fideiussor* is not a robber. A creditor cannot, because of this transaction, be compelled to make restoration by means of the action granted on something given as a pledge, since he is considered to have sold his rights. 1. A mother took gifts from her daughter's betrothed without the girl's knowledge. Because an action on mandate or deposit is inapplicable, the action used is the one for unauthorized administration.

32 (33) PAPINIAN, *Replies, book 10:* An heir ought not to bring an action for pillaging his inheritance against the wife of a deceased husband who had property of her husband in her charge during the period of the marriage. He will act more wisely if he takes her to court with an action for production and for unauthorized administration if she also had the management of her husband's affairs.

33 (34) PAUL, *Questions, book 1:* "Nesennius Apollinaris to Julius Paulus, greetings. A grandmother managed the affairs of her grandson. Both died and the heirs of the grandmother brought an action for unauthorized administration against the heirs of the grandson. The heirs of the grandmother were trying to take into account maintenance provided for the grandson. The rejoinder was that the grandmother had provided it at her own expense as an obligation to a member of her family; he had not asked for a maintenance order nor had such an order been made (*or* nor would such an order have been made). Moreover, it was said that it had been laid down that if a mother provided maintenance, she was not able to claim for what she had provided at her own expense from a sense of obligation to her family. On the other side, it was said that it was only correct to say this if there was proof that the mother had provided maintenance at her own expense; but in the case under discussion it was probable that the grandmother, who acted as manager, provided maintenance from the grandson's own resources. The point at issue is: Does maintenance appear to have been paid for from both estates? I want to know which appears to you to be the juster view." I replied that the question was one of fact; for I do not think that the decision in the mother's case should be so generally applicable either. For what would be the position if she went so far as to state publicly that in providing maintenance for her son, she had it in mind to take either her son himself or his tutors to court? Suppose his father died abroad and the mother supported the son together with the rest of the entourage on the return journey? In a case of this sort, the deified Antoninus Pius laid down that an action should be granted even against the *pupillus* himself. So my opinion will be that you should be readier to listen to the grandmother or her heirs on the question of fact if they want to take maintenance into account, particularly if it is also shown that the grandmother had

even entered it in her expenditure account. The view that it was paid for from both estates should, I think, be completely rejected.

34 (35) SCAEVOLA, *Questions, book 1:* After a divorce, the husband managed his wife's affairs. Possession of the dowry can be obtained not only by an action on dowry but also by one for unauthorized administration. The latter course is possible only if the husband could have done it among the business he transacted at the time when he was transacting it; for otherwise the fact that he did not take payment from himself cannot be brought against him. Indeed, even after he has lost his property, an action for unauthorized administration will still be effective, even though if the husband is taken to court in an action on dowry, he has to be acquitted. But here a certain limit must be observed. The plea "as much as he could, though he later suffered loss" is only applicable if he was in a position to pay her at that time. For if he did not immediately sell off some of his property to raise the money, that does not necessarily mean he failed in his duty; in fact, for him to appear remiss, some period of time will have to elapse. If in the meantime his property is lost before he discharges his duty, he is no more liable to an action for unauthorized administration than if he has never been in a position to do so. But even if the husband is in a position to do so, an action for unauthorized administration is brought because there may be a danger of his ceasing to be. 1. We do not think that this action can be brought against a person who manages the affairs of a debtor in order to compel the return of a pledge in a case where money is owing to him and he had no means of paying himself. 2. Further, we do not believe either that a case of rescission of sale comes within the scope of an action for unauthorized administration, and for this reason, after six months have elapsed, action ceases to be possible in a case where he has either not found a slave in the goods or found him, but has neither found nor received the accessories which went with him or compensation for deterioration in the slave's condition or acquisitions made by the slave himself and not through use of the purchaser's resources, and where those affairs of the purchaser which he was managing did not afford the means whereby he might immediately reimburse himself. 3. For the rest, if a person of substance owes money for a different kind of reason, namely an obligation without limit of time, he should not be charged with not paying it, at least if the rate of interest gives no cause for complaint either. The situation is different in the case of the tutor-debtor, because there it was in his interest to be free of the former obligation so that payment might become enforceable by an action on tutelage.

35 (36) PAUL, *Questions, book 4:* If a freeman, acting in the genuine belief he was my slave, raised a loan and put it to my use, we must see by what action I should be made to repay what he put to our use; for he conducted the transaction not as that of a friend but as that of a master. But an action for unauthorized administration should be granted. This ceases to be available if the money has been paid to the creditor.

36 (37) PAUL, *Views, book 1:* At the time of joinder of issue, it is customary to ask whether the *pupillus* whose affairs have been managed without the sanction of his tutor has been made richer by the transaction because of which he is being sued. 1. Anyone engaging in moneylending has to bear the responsibility both for the interest, and the risk on the loans he himself arranged, unless as the result of misfortunes the debtors lost their property and so were insolvent at the time of the joinder of issue of this action. 2. If a father has managed gifts which he made to his son who has been emancipated, he will be liable to an action by the son for unauthorized administration.

37 (38) TRYPHONINUS, *Disputations, book 2:* A person with an interest-free loan managed the affairs of his creditor. The question is whether he should be made liable for interest on that sum as the result of an action for unauthorized administration. I said that if he ought to have taken payment from himself, he will owe interest,

whereas, if the day for paying the money had not yet come at the time when he was acting as manager, he will not owe interest, but that once the day was past, if he had not entered the money he owed in the accounts of the creditor whose affairs he was managing, he will rightly be made liable for interest by an action of good faith. But let us see what interest he will owe. Would it be the interest the same creditor had lent money at to others? Or would it even be interest at the highest rate? For when anyone puts to his own use the money of a person whose tutelage or affairs he is administering, or a magistrate does so with the public funds of a municipality, he is liable for interest at the highest rate according to the ruling of the deified emperors. But there is a difference in the case of the man who did not help himself to cash in the course of his management but received it from a friend, and that before he managed his affairs. For the former, the ones the ruling deals with, since they should have shown a disinterested good faith, one certainly that was incorrupt and refrained from all gain, are subjected to interest at the highest rate as a sort of punishment because of their manifest abuse of their freedom, whereas the latter received a loan honestly from someone else and should be condemned to pay interest because he did not repay it, not because he appropriated money from the business he was managing. Moreover, it makes a big difference whether liability runs from the present or whether the debtor's loan dates from the past. In the latter case, it would be sufficient to make it interest-bearing instead of interest-free.

38 (39) GAIUS, *Verbal Obligations, book 3:* Anyone paying on behalf of someone else, even without his knowledge and agreement, frees him from liability, but another person cannot lawfully demand payment of what is owing to anyone without his consent. For the principles of both natural justice and the civil law are in favor of our being able to improve another's position, even without his knowledge and agreement, but not of our being able to make it worse.

39 (40) PAUL, *Sabinus, book 10:* If I have a house in common with you and have given a neighbor your share of a guarantee against the danger of loss, it should be said that I can claim what I pay by an action for unauthorized administration rather than by one for dividing common property, because I could have protected my own share without being forced to protect my partner's.

40 (41) PAUL, *Edict, book 30:* He who has, without my knowledge or in my absence, defended my slave in a noxal action will bring an action for unauthorized administration against me for the full amount, not an action on the *peculium.*

41 (42) PAUL, *Edict, book 32:* If you have undertaken business of mine at the request of my slave, if you did it at my slave's instigation only, there will be an action for unauthorized administration between us; if, on the other hand, on the ground of a mandate from the slave, an opinion has been given that you can also bring an action on *peculium* and on benefit taken.

42 (43) LABEO, *Posthumous Works, Epitomized by Javolenus, book 6:* Since you made a payment in the name of a man who had given you no mandate, an action for unauthorized administration is available to you, since by this payment the debtor has been freed from liability by his creditor; unless there was any advantage to the debtor in the money not being paid.

43 (44) ULPIAN, *Disputations, book 6:* A person who, because of his friendship with their father, applied for a tutor for *pupilli* or requested the removal of suspect tutors has no action against them according to a *constitutio* of the deified Severus.

44 (45) ULPIAN, *Opinions, book 4:* Beneficial expenditure on someone's affairs, including expenditure honorably incurred on the offices appertaining to the various social grades, can be claimed for by an action for unauthorized administration. 1. They who have received their freedom unconditionally under a will are not obliged to give an account of work they engaged in during the lifetime of their masters. 2. Titius made a payment to creditors of an inheritance thinking his sister had become heir to the deceased under his will. Although he had done this with the intention of transacting business of his sister, he had, however, in reality transacted business of the sons of the deceased, who were *sui heredes* of their father once the will had been set aside.

Because it is right for him not to suffer a loss, it is held that he can claim for it by an action for unauthorized administration.

45 (46) AFRICANUS, *Questions, book 7:* You gave my son a mandate to buy land for you. When I learned about it, I bought it for you myself. In my opinion, importance attaches to my attitude in making the purchase. For if I did so because of what I knew to be your needs and that you were of a mind to buy, the action between us will be one of unauthorized administration, just as it would be if no mandate had come into it at all, or you had given the mandate to Titius and I had made the purchase because I could more conveniently carry out the transaction myself. On the other hand, if the reason for my buying is to prevent my son being liable to an action on mandate, the better opinion is that I for my part have an action on mandate against you on his account, and you on yours have an action on *peculium* against me, because it is also the case that if Titius had undertaken this mandate and I had made the purchase to prevent his being liable on this account, I would bring an action for unauthorized administration against Titius, and he would bring an action on mandate against you and you against him. The situation is the same too if you have given my son a mandate to give a verbal guarantee on your behalf, and I have done so. 1. If it be supposed that you have given Titius a mandate to give a verbal guarantee on your behalf and that I, because he was for some reason prevented from doing so, have given the guarantee in order to discharge his obligation, an action for unauthorized administration is available to me.

46 (47) PAUL, *Views, book 1:* An action for unauthorized administration is granted to him in whose interest it is to bring this action. 1. And it does not matter whether anyone sues or is taken to court by means of an *actio directa* or an *actio utilis*, because in special courts, proceedings *extra ordinem*, where the set scheme of the formula is not observed, these distinctions are disregarded, especially as both actions are of the same scope and produce the same result.

47 (48) PAPINIAN, *Questions, book 3:* If a brother, without the knowledge of his sister, in the course of managing her affairs, has taken a stipulation from her husband as regards her dowry, it is possible to bring an action for unauthorized administration against him to release the husband from his obligation.

48 (49) AFRICANUS, *Questions, book 8:* If the buyer has sold a thing which a slave sold by me had stolen from me and the thing has ceased to exist, an action for unauthorized administration should be given me in respect of the price, as it should be given if you had transacted business which you thought was yours when it was mine; just as, on the other hand, it should be given to you against me if, under the impression that an inheritance belonging to me was yours, you had discharged a legacy consisting of your own property, since I would be released from the obligation to discharge it.

6

VEXATIOUS LITIGANTS

1 ULPIAN, *Edict, book 10:* An *actio in factum* is available against a person who is alleged to have received money to bring or not bring a lawsuit with vexatious intent. Within the year it is for four times the sum he is alleged to have received after a year for the simple amount. 1. Pomponius writes that it is not only in civil cases but also with criminal offenses that this action has to do, especially as anyone receiving money to bring or not bring a lawsuit vexatiously is also liable under the *lex repetundarum*. 2. Anyone receiving money either before or after acceptance of the action is liable to prosecution. 3. Furthermore, a *constitutio* of our emperor, written to

Cassius Sabinus, forbade the giving of money to a judge or opponent in criminal, civil, or treasury proceedings and ordered that the case be lost from this cause. For it can be disputed whether the *constitutio* is inoperative if the other party accepted with the intention of making an honest compromise. In my opinion, it is inoperative, just as this action also is; for it is not compromise that has been forbidden but squalid extortion. 4. We shall say that we received money, even if we received something in place of money.

2 PAUL, *Edict, book 10:* Furthermore, anyone who has been released from an obligation can be considered to have taken money, and it is the same if a loan has been made interest-free or a thing has been leased out or sold for too little. And it does not matter whether anyone has received money himself or ordered it to be given to someone else or ratified its receipt in his name.

3 ULPIAN, *Edict, book 10:* And in general the same will be true of any gain at all which he has received on this account either from the other party or from anybody else whatsoever. 1. Therefore, if he received anything to bring an action, whether he brought it or whether he did not, he is liable to prosecution, and so is the person who took anything not to bring one even if he brought it. 2. A person who has compounded is also liable under this edict. A person is said to have compounded who has made a dishonorable agreement. 3. The following fact should be noted that a man who has given money to have anyone prosecuted will not himself have the right to reclaim it; for he has behaved disgracefully. But the right to claim it will be given to the man who was to be made the object of vexatious litigation as the result of the payment. Therefore, if anyone has taken money both from you to bring a lawsuit against me and from me for him not to bring it against me, there will be two actions I can bring against him.

4 GAIUS, *Provincial Edict, book 4:* This action is not available to the heir because the right to reclaim the money the dead man gave should be enough for him.

5 ULPIAN, *Edict, book 10:* But an action is available against the heir for what has come to him. For it has been laid down that dishonest gains are to be taken from heirs also, even though charges lapse. For example, a reward given for committing fraud or to a judge for a favorable verdict and anything else gained by criminal means will be taken from the heir as well. 1. But in addition to this action *condictio* is also available if the only disgraceful behavior is on the part of the recipient. But if it is on the part of the giver as well, the position of the one in possession will be the stronger. If then *condictio* has taken place, is this action no longer possible, or should it be granted for three times the amount? Or as in a case of theft do we grant both an action for four times the amount and *condictio*? In my opinion, one or other of the actions is enough. Further, in cases where *condictio* is available, there is no need after a year to grant an *actio in factum.*

6 GAIUS, *Provincial Edict, book 4:* In the case of a person who gave money to avoid a lawsuit, the year runs from the time when he gave it, provided that he had the opportunity to go to court. In the case of the person someone else paid to have an action brought against, there is room for doubt whether the year should be reckoned from the day the money was given or rather from the time he got to know it had been given, because the man who does not know appears not to have the opportunity of going to court. In fact, the fairer thing is for the year to be reckoned from the time he got to know.

7 PAUL, *Edict, book 10:* If anyone has received money from someone else not to bring an action against me, if the payment was made on a mandate from me, or by a procurator with general powers over my affairs, or by one intending to transact business of mine and I ratified it, it is considered that I myself made the payment. But if someone

else made a payment to him to prevent a lawsuit without a mandate from me, possibly out of pity, and I did not ratify it, then he himself can reclaim it, and I can also bring an action for four times the amount. 1. If money has been received to bring a lawsuit against a son-in-power, the father too should be granted an action. Likewise, if a son-in-power has received money to bring or not bring a lawsuit, an action will be granted against him, and if someone else without a mandate from me has paid to prevent a lawsuit against him, in this case too he can himself claim his money back, and I can also bring an action for four times the amount. 2. In a case where a tax farmer kept possession of slaves and money had been paid to him which was not due, he too according to this part of the edict is liable to an *actio in factum*.

8 ULPIAN, *Opinions, book 4:* If the official with cognizance in this matter has been informed that money has been received from an innocent man on the pretext of some offense which has not been proved against him, the official should order the restoration of what has been illegally exacted in accordance with the terms of the edict which deals with those who are alleged to have received money to bring or not bring a lawsuit, and he should inflict a penalty proportionate to the offense on the person who committed it.

9 PAPINIAN, *Adultery, book 2:* If a slave who is accused is taken to court, an inquiry is held into his case. If he is acquitted, his accuser is ordered to pay his master double his value. But there is also, without reference to the assessment of value, an inquiry into his accuser's vexatious litigation. For the offense of vexatious litigation is distinct from the loss which has been suffered by the master in respect of his slave on account of the inquiry.

BOOK FOUR

1

RESTITUTIONES IN INTEGRUM

1 ULPIAN, *Edict, book 11:* The benefit of this title does not require to be stressed, since it is self evident. For under this head, the praetor helps men on many occasions who have made a mistake or been cheated, whether they have incurred loss through duress or cunning or their youth or absence

2 PAUL, *Opinions, book 1:* or through change of status or justifiable mistake.

3 MODESTINUS, *Encyclopaedia, book 8:* All *restitutiones* are promised by the praetor on cause being shown. This is, of course, so that he may examine the justice of the grounds alleged and determine whether they are in truth those on account of which he helps individuals.

4 CALLISTRATUS, *Monitory Edict, book 1:* I know that it has been the practice of some magistrates not to hear a person who asks for *restitutio in integrum* in respect of a very trivial matter or sum, if this would prejudice a claim in respect of a more substantial matter or sum.

5 PAUL, *Edict, book 7:* No one is held to be barred from property where the praetor promises him *restitutio in integrum.*

6 ULPIAN, *Edict, book 13:* It has very often been settled that the successors not only of a *minor* but also of those who have been absent on state business and likewise of all who could themselves obtain *restitutio in integrum* can obtain such *restitutio.* Therefore, one can obtain *restitutio in integrum* whether one is an heir or a person to whom an inheritance has been restored or the successor of a son-in-power who was a soldier. Accordingly, if a *minor,* whether male or female, is reduced again to slavery, *restitutio in integrum* will be granted to the master, though within the prescribed period of time. Again, should a *minor* in this position happen to be put to a disadvantage over an inheritance upon which he entered, Julian, in the seventeenth book of his *Digest,* writes that his master can have the power of repudiation not only in virtue of the privilege accorded by youth but even where youth does not furnish an excuse. The reason is that patrons used the privilege given by the laws not in order to acquire an inheritance but to punish freedmen.

7 MARCELLUS, *Digest, book 3:* The divine Antoninus issued a rescript to the praetor Marcius Avitus, in order to help someone who had lost his property when absent, in these terms: "Although normal usage is not readily to be changed, nevertheless, where clear equity demands it, relief is to be given. And so, if a person summoned to appear in court has not appeared and on account of this the decision has been given in the normal way, but immediately afterward he appears in court while you are still sitting, he can be considered to have failed to appear not through his own fault but because he did not properly hear the summons of the court officer, and therefore *restitutio* can be

given. 1. Nor is help of this kind confined to these examples. For those who have been deceived without fault on their part, especially if their opponent has behaved fraudulently, ought to receive help, since an action generally lies in respect of fraud and a good praetor should rather, as reason and equity demand, grant *restitutio* with respect to a lawsuit than grant an action involving *infamia*. Recourse to the latter is to be had only when there can be no place for any other remedy.

8 MACER, *Appeals, book 2:* There is this point of difference between those under twenty-five and those who are absent on state business. *Minores*, even when defended by their tutors or curators, will nevertheless obtain *restitutio in integrum* against the state, of course, on cause being shown. But one who is absent on state business and also others who are held to be in the same legal condition, if they have been defended by their procurators, are generally given relief by *restitutio in integrum* only to the extent that they are allowed to appeal.

2

ACTS DONE UNDER DURESS

1 ULPIAN, *Edict, book 11:* The praetor says: "I will not hold valid what has been done under duress." At one time the words of the edict were: "what has been done through force or under duress." For mention was made of force because of the compulsion brought to oppress the will, whereas duress expressed the alarm of a mind brought about through present or future danger. But the mention of force was later omitted, because whatever is done through extreme force is also held to be done under duress.

2 PAUL, *Views, book 1:* Moreover, force is the attack of a more powerful agent which cannot be repelled.

3 ULPIAN, *Edict, book 11:* Therefore, this clause comprises both force and duress and if anyone, compelled by force, does something, he may obtain *restitutio* through this edict. 1. But we understand force to be severe and such as is used contrary to sound morals but not that which a magistrate properly brings to bear, of course, if this is done lawfully in accordance with the legal powers of his position. Yet should a magistrate of the Roman people or a governor of a province commit a wrongful act, Pomponius writes that this edict is applicable, as, he says, where he has extorted money from someone through terror of death or flogging.

4 PAUL, *Edict, book 11:* I think that this is also the case where the fear is that of being made a slave or something similar.

5 ULPIAN, *Edict, book 11:* Labeo says that duress is to be understood not as any alarm whatever but as fear of a serious evil.

6 GAIUS, *Provincial Edict, book 4:* Moreover, we say that the duress relevant to this edict is not that experienced by a weak-minded man but that which reasonably has an effect upon a man of the most resolute character.

7 ULPIAN, *Edict, book 11:* Pedius in his seventh book says that fear of *infamia* is not covered by this edict, nor does fear of some annoyance lead to *restitutio* under it. Equally, if some timorous person is needlessly afraid of nothing, there will be no *restitutio* under this edict since neither through force nor under duress has anything been done. 1. Likewise, if a person caught in the act of theft or adultery or in some other disgraceful conduct made a present of something or incurred an obligation, Pomponius, in his twenty-eighth book, rightly writes that he can invoke this edict, for he feared either death or prison. Although it is not always lawful to kill an adulterer or thief, unless he defends himself with a weapon, he could still be killed unlawfully, and therefore fear was justified. Again, it is held that relief under this edict should be given

to someone who has transferred property so that he might not be given up by the person who has caught him, since, if he had been given up, he could have suffered the penalties which we have stated.

8 PAUL, *Edict, book 11:* Those indeed [who have made the discovery] are liable under the *lex Julia* because they have accepted something on account of a proved adultery. Yet the praetor ought also to intervene and compel them to make *restitutio*. For what has been done is morally wrong, and the praetor does not consider whether the person who made the gift is an adulterer but only what the recipient has obtained by inspiring the former with the fear of death. 1. If someone who is ready to destroy documents relating to my status unless I give [something to him] receives money [from me], there is no doubt that he has exercised compulsion through the most extreme fear, at least if an action to have me declared a slave has already been brought against me and I cannot be declared free if those documents are lost. 2. But if a man or woman made a gift so that he or she would not suffer sexual assault, this edict applies, since for decent people a fear of this kind ought to be worse than the fear of death. 3. In relation to the cases which, we have said, fall under the edict, it makes no difference whether someone fears for himself or for his children, since their affections make parents prone to terror more with regard to their children than themselves.

9 ULPIAN, *Edict, Book 11:* Moreover, we ought to understand the duress in question to be immediate, not a suspicion that it may be brought to bear, and so Pomponius writes in his twenty-eighth book. For he says that fear is to be understood as having been inspired, that is, where dread has been inspired by someone. Then he examines the question whether the edict applies in the case of a person who, hearing that some armed man was approaching, abandoned his land. And he reports that Labeo thinks that the edict is not applicable and that neither is the interdict *unde vi*, since I am not held to have been forcibly ejected as I have run away without waiting to be ejected. The position would be different where, after armed men had entered, I then left. For, [he says], the edict is then applicable. The same jurist also says that if you perchance should collect an armed band and build forcibly on my land, both the interdict against force or stealth and this edict will be applicable, obviously because I allow you to do that through fear. Again, if, coerced by force, I deliver possession to you, Pomponius says that this edict is applicable. 1. Moreover, it is worthy of note that the praetor in this edict expresses himself generally and *in rem* and does not add a reference to the person by whom the act is done. And, therefore, whether it is an individual who inspires fear or a crowd of people, a municipal body, guild, or corporation, this edict will apply. But although the praetor includes force exercised by anyone, nevertheless, Pomponius neatly says that if, the more readily to protect or free you from the force of the enemy or robbers or a mob, I have accepted something from you or placed you under an obligation, I ought not to be liable under this edict, unless I myself subjected you to this force. But if I have nothing to do with the force, I ought not to be liable since I am rather held to have accepted a reward for my services. 2. Pomponius also writes that some rightly think that by means of this edict *restitutio* is even extended to a case where a slave is manumitted or a building pulled down, if the act is performed under compulsion. 3. But as to the praetor's statement that he will not hold valid [what has been done], let us see how far this is to be understood. In point of fact, either the matter has not been completed, although fear has intervened, as where money following upon a stipulation has not been paid, or it is completed, as where, after the stipulation, payment has been made or the debtor through duress [placed upon the creditor] is formally released from his obligation or some similar event happens which completes the transaction. Pomponius writes that certainly in the case where a transaction is completed, at times both a defense and an action will lie, but, where it is incomplete, only a defense. But I know for a fact that when some men of Campania terrorized a certain person and extorted from him a *cautio* containing a promise to pay, our emperor issued a rescript enabling him to seek *restitutio in integrum* from the praetor and that the praetor, when I was sitting as assessor, issued an interlocutory decree to the effect that if he wished to bring an action against the Campanians, one

was available or if he wished to defend an action brought by them, a defense was not lacking. From this constitution it is inferable that, whether a matter has been completed or not, both an action and a defense are granted. 4. Moreover, a person, if he wishes, is granted both an action *in rem* and an action *in personam*, after the formal release or other discharge has been rescinded. 5. Julian, in the third book of his *Digest*, thinks that a person to whom property has been handed under duress ought not only to restore it but also to undertake that there has been no fraud or malice. 6. Yet although we think that an action *in rem* is to be granted because the property belongs to the person on whom force has been brought to bear, it is still said, not without reason, that if anyone should bring an action for fourfold, the action *in rem* ceases; and the reverse is also true. 7. In accordance with this edict, *restitutio*, that is, *in integrum*, of the following type is to be made by authority of the judge. If property has been handed over through force, it is returned and, as has been said, an undertaking that there has been no fraud or malice is given to cover the case where the property has been damaged. And if there has been a discharge by formal release, the obligation will be restored to its former condition, even to the extent, as Julian writes in the fourth book of his *Digest*, that if a money debt has, through force, been formally released, unless either payment is made or the obligation restored and issue joined, the person responsible is to be condemned to pay fourfold. Again, if through force I have made a promise by stipulation, there must be a formal release of the stipulation. Equally, if usufructs or servitudes have been lost, they will have to be restored. 8. Moreover, since this action is framed *in rem* and does not coerce the individual exercising force, but the praetor intends that there should be *restitutio* against all in respect of what has been done on account of duress, Marcellus makes an apposite remark on a decision by Julian that if a guarantor brings force to bear with the result that his obligation is formally released, the action against the principal debtor is not to be restored, but the guarantor ought to be condemned to pay fourfold unless he restores the action against the principal debtor. But the opinion noted by Marcellus is more correct, that this action lies even against the principal debtor, since it is framed *in rem*.

10 GAIUS, *Provincial Edict, book 4:* It is true that if, through the act of a debtor who has employed duress, his guarantors have been discharged from their obligations by formal release, an action can also be brought against the guarantors to compel them again to place themselves under the obligation. 1. If under duress I am compelled by you to release you formally from your stipulation, at the discretion of the judge before whom the action arising from this edict is brought, not only will your personal obligation be restored, but you will be required to bring in guarantors also either the same or others no less satisfactory; and furthermore, you will be required to restore pledges you gave in the same case.

11 PAUL, *Note on Julian, Digest, book 4:* If some third party, without a malicious act on the part of a guarantor, should bring force to bear so that the guarantor receives a formal release, the guarantor will not be liable to restore also the obligation of the principal debtor.

12 ULPIAN, *Edict, book 11:* Again, *restitutio* ought to be made of the offspring of slave women, the young of animals, fruits, and all other accessions. Nor should *restitutio* be made only of what has been obtained. If I could have obtained more but was prevented through duress, the person employing duress will also have to make this good. 1. The question could be raised whether the praetor in this edict intends that *restitutio* of what he had transferred should be made to a person against whom force has been used, where he has himself used force. And Pomponius writes in his twenty-eighth book that the praetor ought not to help him. For since it is lawful, he says, to repel force with force, he has suffered what he has himself done. Therefore, if he compelled you under duress to make a promise to him and shortly afterward I compelled him under duress to give you a formal release, there is nothing in respect of which *restitutio* is to be made to him. 2. Julian says that a person who brings force to bear on his debtor in order to make the latter pay him is not liable under this edict on account of the nature of the action which requires loss on the ground of duress, although it cannot be denied that the creditor has fallen under the provisions of the *lex Julia de vi* and lost his right to what has been lent.

13 CALLISTRATUS, *Judicial Examinations, book 5:* For there exists a decree of the divine Marcus in these words: "It is best that where you think you have a claim you bring an action. When Marcianus said, 'I have used no force,' the emperor replied, 'do you think that force is used only if men are wounded?' There is also force whenever someone demands what he thinks is due to him without going to court. Therefore, if I receive proof that anyone rashly possesses or has taken without a court order any property of his debtor or money owed to him which has not been voluntarily given by the debtor himself and to have taken the law into his own hands in this matter, such a person will not have the right to what he lent."

14 ULPIAN, *Edict, book 11:* Likewise, if I compelled you to give me a formal release although I was protected by a defense against you without restriction of time, this edict does not apply because you have lost nothing. 1. If anyone should not make *restitutio*, an action for fourfold is promised against him. Moreover, everything of which there ought to be *restitutio* is quadrupled. The praetor has shown sufficient leniency to the defendant by allowing him the power of making *restitutio* if he wishes to avoid a penalty. However, after a year he promises an action for the simple value, not always, but only on cause being shown. 2. Moreover, with respect to the showing of cause, the relevant point is that if there is no other action, then this is given. Indeed, since the wrong inflicted under duress affords no redress after a year to be calculated with allowance for holidays, there ought to be a satisfactory reason justifying the award of this action after a year. However, there can be another action in the following type of case. If someone against whom force has been used has died, his heir has the action for recovery of an inheritance since the one who has exercised force possesses "as possessor." For this reason the action on account of duress is not given to the heir, although, if the year has not expired, even the heir can bring the action for fourfold. Further, this action is given to a successor because it includes also a claim for the property. 3. In this action, no inquiry is made as to whether it was the defendant who used duress or someone else. For it suffices that the plaintiff shows that duress or force was brought to bear on him and that the person sued on account of the affair has made a gain although he has committed no offense. For since duress insures failure to perceive the true state of affairs, an individual rightly is not required to show who used duress or force against him. And, therefore, the plaintiff is only required to show that there was a case of duress with the result that he gave someone a formal release of a debt or handed over property or did anything else. Nor should it appear unjust to anyone that one person is condemned to fourfold on the ground of another person's deed, because the action is not for fourfold in the first instance, but only if *restitutio* of the property is not made. 4. Moreover, since this is an *actio arbitraria*, the defendant, right up to the moment at which the *arbiter* makes his award, is free to make *restitutio* of the property according to what we have said above. But should he not do this, he lawfully and rightfully suffers condemnation in fourfold. 5. Yet at times even if it is alleged that duress has been used, the judgment is for acquittal. For what if Titius has certainly placed someone under duress in a case where I am not an accomplice and I acquire something as a result which ceases to exist without fraud or malice on my part, ought I not to be acquitted under the judge's direction? Or if the property is a slave who has run away, I ought equally to be acquitted if I undertake on the judge's direction that I will restore him if he falls into my hands. Hence, some think that a buyer in good faith from a person who has brought force to bear is not liable, nor is one who accepted the property as a gift or was left it as a legacy. But Vivianus very rightly held that even such persons are liable, in order that the duress which I suffered should not cause me loss. Pedius also in his eighth book writes that the discretion of the judge in the matter of *restitutio* is such that he may indeed order the person who brought force to bear to make *restitutio* even if the property is in the hands of another and further that he may order the person in whose hands it is to make *restitutio*, even though it was another who exercised duress. For duress exercised by one person ought not to be the means of another's advantage. 6. Labeo says that if any-

one incurs a debt under duress and gives as guarantor someone who is not compelled, both he himself and the guarantor are freed from liability. But if the guarantor alone joins under duress, he alone is freed, not also the principal debtor. 7. Moreover, what is quadrupled is the value of the property including fruits and all accessions. 8. If anyone under duress promises to appear in court and afterward provides a guarantor, the latter also is freed. 9. Again, if someone secured through force a stipulation, did not give a formal release, and was condemned in the action for fourfold, Julian thinks that if he sues on the stipulation, he has a rejoinder to the defense since included in the fourfold obtained by the defendant is the simple value. However, Labeo says that the person who brought force to bear is nevertheless to be barred by the defense even after the action for fourfold. But as this seems harsh, it is to be mitigated through punishing him by a condemnation for threefold and compelling him in all circumstances to give a formal release. 10. Moreover, insofar as we say that the simple value is included in the fourfold, the distinction is that in the condemnation for fourfold, the property is certainly in all circumstances included and *restitutio* of it is made but damages to the extent of threefold represent the penalty. 11. What is the position where a slave has been lost without malice or fault on the part of the person who brought force to bear and has been condemned? In this case, condemnation will not include the value of the property, if the slave dies before the time at which the action to enforce the judgment is brought, because the plaintiff is compelled to be satisfied with the penalty of threefold on account of the offense. Moreover, if the slave is alleged to have taken to flight, the defendant is compelled to furnish a *cautio* undertaking that he will pursue the slave and in any event return him; despite this, the person against whom force was used will continue to have the action *in rem* or action for production or any other that lies to recover the runaway, with the result that if his master recovers him by any means whatsoever, the person who is sued on the stipulation (*cautio*) is protected by a defense. This is the position after condemnation. But if the slave had died before sentence without malice or fault on the part of the defendant, the latter will be liable, and this is provided in the following words of the edict: "and that property is not restored in accordance with the decision of the judge." Therefore, if a slave flees without malice or fault on the part of the defendant, an undertaking must be given through the judge that he will pursue and restore the slave. Again, where there has been no fault on the part of the defendant, he will still be liable if the property would not have perished except for the exercise of duress, as is the position under the interdict *unde vi* or that against force or stealth. Therefore, at times, someone recovers the price of a slave who had died, where he would have sold him if he had not been subjected to force. 12. One who has brought force to bear is not a thief since he has acquired possession from me, although one who has taken by force is held to be a most unprincipled thief, and so Julian decided. 13. It is certain that one who has employed duress is also liable for fraud or malice, and so Pomponius says, and that the one action [if brought] is a bar to the other, a defense *in factum* being available. 14. Julian says that only the extent of a person's interest is quadrupled and, therefore, where someone who owed forty under a *fideicomissum* was forced to promise three hundred and paid this amount, he will recover four times two hundred sixty; for it was in this amount that the force to which he was subjected took effect. 15. Accordingly, if several persons have brought duress to bear and one was sued, certainly, if he voluntarily restored the property before sentence, all are freed. Even though he has not acted in this way, but, upon sentence, has restored fourfold, the better opinion is that the action on the ground of duress against the others is also extinguished.

15 PAUL, *Edict, book 11:* Or an action will be given against the others in respect of that which has not been recovered from him [the person sued].

16 ULPIAN, *Edict, book 11:* What we have said as to the position where several persons have employed duress also applies where the property falls into the hands of one person and it is another who has employed duress. 1. But if slaves have employed duress, there will certainly be a noxal action on their account; moreover, a master into

whose hands the property has fallen can be sued. When sued, he will either restore the property or pay fourfold, according to what has already been said, and this will also benefit the slaves. However, if he is sued by the noxal action and prefers to surrender the slaves, he can still be sued if the property has fallen into his hands. 2. This action is given to the heir and other successors, since it involves a claim for the property. Moreover, not improperly it is given against the heir and other successors in respect of what has come into their hands. For although a penalty does not pass to the heir, yet what has been obtained dishonorably or criminally ought not to benefit him, and this has been provided by rescript.

17 PAUL, *Questions, book 1:* Therefore, let us see what the position is where an heir consumes what falls into his hands. Does he cease to be liable, or rather is it a sufficient condition for liability that he has once acquired the property? Further, if he dies after consuming the property, does the action in all circumstances lie against the heir, since he has assumed the obligations of the inheritance, or is it not to be given since nothing has fallen into the hands of the second heir? The better opinion is that the action in all circumstances lies against the heir's heir; for it is sufficient that the property should once have been acquired by the first heir, and then the action lies without restriction of time. Otherwise, it will have to be said that not even the person who consumed what fell into his hands is liable.

18 JULIAN, *Digest, book 64:* If the very object which fell into another's hands perishes, we say that his wealth has not been increased. But if, indeed, the object has been converted into money or some other thing, no further investigation of the eventual outcome is necessary, but in all circumstances he is held to have profited, although afterward he should lose what he has gained. For the Emperor Titus Antoninus issued a rescript to Claudius Frontinus about the value of property in an inheritance to the effect that the inheritance could be claimed from him on this very ground that although the property which has been in the inheritance was not in his hands, nevertheless, in that he has profited, however often the individual objects have been changed, the price received for those very things places him under an obligation just as if they had physically retained the same form.

19 GAIUS, *Provincial Edict, book 4:* Moreover, the proconsul promises an action against the heir to the extent of what has fallen into his hands. This is to be understood as relating to the granting of the action without restriction of time.

20 ULPIAN, *Edict, book 11:* Moreover, calculation of the amount which has fallen into the hands of the heir is made with reference to the time of joinder of issue, provided only that it is certain that something has fallen into his hands. The same applies if something has fallen into the total assets of the person who has himself brought force to bear so that it is certain that it will reach the heir, that is, if a debtor has been given a discharge.

21 PAUL, *Edict, book 11:* If a woman who has shown ingratitude toward her patron, knowing that she has been ungrateful and having put her status at risk, gave or promised something to her patron so that she might not be reduced to slavery, the edict is not applicable because she herself induced such duress. 1. The praetor will not hold valid acts done under duress no matter how much time has passed. 2. One who delivers possession of land not his own may recover the fourfold or simple value not of the land but of the possession together with the fruits. For valuation is made of what ought to be restored, that is, what is lost. However, what is lost is possession alone together with the fruits. Pomponius also holds this. 3. If a dowry is promised under duress, I do not think that an obligation arises because it is very true that such a promise of a dowry is void. 4. If I am compelled under duress to withdraw from a sale or hire, it is to be seen whether nothing has been done and the old obligation remains or whether this is similar to a formal release, because there is no obligation in good faith upon which we can rely since it is ended by being lost. The better opinion is that the situation resembles that of formal release, and, therefore, a praetorian action

arises. 5: If under duress I have entered upon an inheritance, I think that I effectively become heir because, although I would have refused if I had a free choice, nevertheless, when compelled, I had the intention to enter. But I am to have *restitutio* through the agency of the praetor so that the power of repudiation is granted to me. 6. If I am compelled to repudiate an inheritance, the praetor will help me in a double way, either by giving *actiones utiles* as though I was heir or by providing the action on account of duress so that it is open to me to elect whichever way I like.

22 PAUL, *Views, book 1:* Where someone has thrust a person into prison so that he might extort something from him, whatever has been done on this ground is void.

23 ULPIAN, *Opinions, book 4:* It is not probable that a person who alleged that he held rank was compelled in the city unjustly to pay something he did not owe when he could have invoked the law of the land and approached someone possessed of authority who would certainly have prevented him from being subjected to force. But the most manifest proof of violence ought to be brought to rebut a presumption of this nature. 1. If, terrified by a reasonable fear of an inquiry to which a powerful opponent has threatened to bring him in chains, a person has sold under compulsion what it was lawful for him to keep, the governor of the province will restore the matter to its rightful position. 2. If a moneylender by wrongfully confining an athlete and preventing him from entering the contests compelled him to undertake to pay an amount beyond that which he owed, a competent judge on receiving proof will decree that the matter be restored to its rightful position. 3. If anyone has been forcibly compelled, through the intervention of the governor's attendants without an inquiry by a judge, to pay one claiming by assignment from his adversary what he did not owe the latter, the judge orders *restitutio* of what had been wrongfully extorted to be made by the one who had caused him the loss. But if he has paid what is owed on a mere demand, where no judicial inquiry has been held, although the demand should not have been made out of turn but in accordance with the law, nevertheless, it is contrary to legal principle to revoke what has enabled payment of the amounts owed by him.

3
MALICE OR FRAUD

1 ULPIAN, *Edict, book 11:* By this edict the praetor affords relief against shifty and deceitful persons who by a certain cunning have harmed others, so as to prevent either their wickedness benefiting the former or their simplicity harming the latter. 1. And in fact these are the words of the edict: "Where something is alleged to have been done with a malicious or fraudulent intent and there is no other relevant action and there seems to be a reasonable ground, I will grant an action." 2. Servius indeed defines malice or fraud as a certain contrivance for the deception of another where one thing is pretended and another intended. But Labeo says there can be an intention to cheat someone even without pretense and further that without a malicious or fraudulent intent, one thing can be intended, another pretended, as in the case of persons who practice dissimulation of this kind and protect either their own or another's interest. And so he himself defines malice or fraud as being every kind of cunning, trickery, or contrivance practiced in order to cheat, trick, or deceive another. Labeo's definition is correct. 3. Moreover, the praetor is not content to say malice or fraud but added the word "evil," since the old lawyers described even malice or fraud as good and held this expression to stand for ingenuity, especially where something was devised against an enemy or robber. 4. The praetor says: "if there is no other relevant action." He is right to promise this action only if there is no other, since an action involving *infamia* ought not rashly to be decreed by the praetor if there is one derived from the civil or magisterial law which could be brought. The rule applies to this extent, as Pedius also writes in his eighth book, that even if there is an interdict which someone could bring or a defense by which he could protect himself, this edict ceases to apply. Pomponius

says the same in his twenty-eighth book and adds: "And if someone is protected by means of a stipulation, he cannot have the action for fraud as, for example, if there has been a stipulation about fraud." 5. The same jurist says further that if it is not proper for an action to be granted against us, as where a stipulation has been made with malicious or fraudulent intent of so disgraceful a nature that no one would grant an action on it, I ought not to take trouble to obtain the action for fraud since no one will grant an action against me. 6. Pomponius also reports that Labeo thinks that even if a person could obtain *restitutio in integrum*, this action should not be available to him and further that if some other action was lost by lapse of time, this action ought not to be available as one who omitted to sue has himself to blame, unless malice of fraud has also been applied to the specific purpose of effecting the lapse of time. 7. If anyone having an action under civil or magisterial law reduced it to a form of stipulation and discharged it by formal release or other method, he could not bring the action for fraud since he had another action, unless he lost the latter through malice or fraud. 8. Moreover, not only if there is another action against the person whose malice or fraud is the object of inquiry,

2 PAUL, *Edict, book 11:* or the situation could be retrieved as against him,

3 ULPIAN, *Edict, book 11:* does this edict not apply, but even if against another

4 PAUL, *Edict, book 11:* there is an action or if I can retrieve the situation by some proceeding against another.

5 ULPIAN, *Edict, book 11:* And so if some *pupillus* has been cheated by Titius, acting in collusion with his tutor who gives his authority, he ought not to have the action for fraud against Titius since he has the action on tutelage under which he recovers to the extent of his interest. Certainly, if the tutor is not solvent, it will have to be said that the action for fraud is granted to him.

6 GAIUS, *Provincial Edict, book 4:* For one whose action is useless on account of his adversary's lack of means is held to have no action.

7 ULPIAN, *Edict, book 11:* Further, Pomponius appropriately interprets the words "if there is no other action" to mean, if the person concerned can retrieve the situation in any other way. Nor does what Julian writes in his fourth book seem to be opposed to this opinion, namely that where someone under twenty-five, deceived by the advice of a slave, has sold him together with his *peculium* and the buyer has manumitted him, the action for fraud is to be given against the manumitted slave (for we assume that the buyer has not been fraudulent so that he cannot be made liable on the purchase); or there is no sale if he was deceived with respect to the very fact that he was selling. And the fact that the case involves a *minor* does not give a ground for *restitutio in integrum*, since against a person who has been manumitted no *restitutio in integrum* can apply. 1. It follows further that if a person can be made secure from financial loss by means of a penal action, it is to be said that the action for fraud is not available. 2. Moreover, Pomponius says that the action for fraud is not available even if the [other] action may be brought by anyone. 3. However, Labeo thinks that the action for fraud is to be granted not only if there is no other action but also if there is no doubt whether there is another, and he puts these cases. A person who owed a slave to me, whether on account of sale or stipulation, gave poison to him and delivered him in this state; or he owes land and, before delivering possession, has imposed a servitude on it or destroyed buildings, cut down or dug up trees. Labeo says that, whether he has given an undertaking about fraud or malice or not, an action for fraud is to be given against him, since, if he has given an undertaking, it is doubtful whether an action on stipulation lies. But the more correct opinion is that if he has indeed made a promise about fraud or malice, the action for fraud is not available since there is an action on stipulation. If no promise has been made in the case of the action on sale, certainly the action for fraud is not available since there is one on sale but, in the case of that on stipulation, the action for fraud is necessary. 4. If the owner killed a slave in whom another had the right of use, the latter may have recourse to both the Aquilian action and the action for production, provided that the owner was in possession

when he killed the slave, and, therefore, the action for fraud is not available. 5. Likewise, if an heir before entering upon the inheritance kills a slave bequeathed in a legacy, since he is killed before the legatee acquires ownership, the Aquilian action does not lie. Moreover, the action for fraud is not available, no matter at what time he killed him, because the action based on the will lies. 6. If your quadruped through another's fraud or malice has caused me loss, the question is asked whether I have against the latter the action for fraud. And I have decided, in accordance with what Labeo writes that if the owner of the quadruped is not solvent, the action for fraud ought to be given, although, if noxal surrender has followed, I do not think that it should be given even for the amount by which the loss exceeds [the value of the quadruped]. 7. If you have released my slave from fetters with the result that he took to flight, Labeo also asks whether an action for fraud is to be given. And Quintus in a note on Labeo says that if you did not do this out of pity, you will be liable for theft; if out of pity, an *actio in factum* ought to be given. 8. A slave provided his master with someone as guarantor for an agreement made in return for freedom on condition that after he was freed, the obligation should be transferred to him. When manumitted, he did not permit the transfer of the obligation. Pomponius writes that the action for fraud will be available. But if it is the patron's fault that the obligation is not transferred, it must be said that the guarantor is to be given a defense against him. I have this problem: how will the action for fraud be given since there is another action? Someone perhaps might reply that since the patron, if he sues the guarantor, can be met by a defense, it ought to be said that an action for fraud is to be decreed on the ground that an action which is met by a defense is no action. And yet the patron is barred only if he refuses to accept as guarantor the very person who has been manumitted. Certainly, an action for fraud ought to be granted the guarantor against the person manumitted; or if the guarantor is not solvent, it will be given to the master. 9. If my procurator with fraudulent or malicious intent allows my adversary to win with the result that he is acquitted, the question can be asked whether I have an action for fraud against the successful party? And I think that the action will not lie if the latter is prepared to accept a new trial incorporating the defense "if there has been collusion." Otherwise, the action for fraud will be given, provided, of course, that no action can be brought against the procurator on the ground of his insolvency. 10. Pomponius also reports that the praetor Caecidianus did not give an action for fraud against one who affirmed the solvency of a person to whom money was lent, and this is correct. For the action for fraud should not be given unless there has been serious and manifest deceit.

8 GAIUS, *Provincial Edict, book 4:* But if you know that he has lost his property and, for your own profit, declare to me that he is solvent, an action for fraud is properly given against you since, in order to deceive me, you falsely recommend another.

9 ULPIAN, *Edict, book 11:* If anyone states that an inheritance is of trifling value and so buys it from the heir, there is no action for fraud since the action on sale suffices. 1. But if you persuade me to decline an inheritance on the ground that it is bankrupt, or to choose a slave [under a legacy] on the ground that there is none better in the household, I say that the action for fraud is to be given if you have acted deceitfully. 2. Likewise, if the tablets of a will have been suppressed for a long time, lest there be an allegation that it is unduteous, and then on the death of the son [of the testator] are produced, the heirs of the son can bring both the action under the *lex Cornelia* and the action for fraud against those who suppressed the will. 3. Labeo, in the thirty-seventh book of his *Posthumously Published Works*, writes that if Titius claims your oil as his and you have deposited this oil with Seius for him to sell and retain the price until the question has been finally determined as to which of you owns the oil, and Titius refuses to join issue, since you can sue Seius by neither the action on mandate nor that against a *sequester*, as the condition governing the deposit has not yet been fulfilled, an action for fraud is to be brought against Titius. But Pomponius, in his twenty-seventh book says that the *actio praescriptis verbis* can be brought against the *sequester* or, if he is not solvent, the action for fraud against Titius. This distinction is held to be correct. 4. Moreover, if on the orders of the judge, you give in noxal surrender to me a slave who has been pledged to you and are absolved, you are liable under the action for fraud, should it become evident that the slave was given as a

pledge. 4a. This action for fraud is noxal. Accordingly, Labeo also writes in his thirtieth book *On the Peregrine Praetor* that the action for fraud in the name of a slave is sometimes given against the *peculium* and sometimes noxally. For if the matter to which the fraud relates is that in respect of which an action on the *peculium* would lie, the latter action is not to be given. But if it would have given rise to a noxal action, such an action will lie. 5. The praetor properly has provided for the investigation of cause since this action is not to be granted at random. For example, in the first place, if the sum in question is modest,

10 PAUL, *Edict, book 11:* that is, up to two aurei,

11 ULPIAN, *Edict, book 11:* it ought not to be given. 1. Moreover, it will not be given to certain persons, for example, children or freedmen against parents or patrons, since it involves *infamia*. Nor ought it to be given to a man of low rank against someone of higher rank, for example, to a plebeian against a man of consular rank possessing acknowledged authority or to a man of licentious or spendthrift or other worthless habits against a man of more correct behavior. Labeo writes to the same effect. What then, is the position? In the case of such persons, it is to be said that an *actio in factum* is to be given so worded as to make mention of good faith,

12 PAUL, *Edict, book 11:* so that they might not profit from their fraud or malice.

13 ULPIAN, *Edict, book 11:* Yet the action for fraud is to be given to the heirs of such persons, likewise against the heirs [of the offender]. 1. Likewise, with respect to the investigation of cause, Labeo says that the position is that no action for fraud should be given against a *pupillus*, unless perchance he should be sued as heir. I think that he may also be sued on account of his own fraud or malice if he is verging on puberty, especially if he has thereby profited.

14 PAUL, *Edict, book 11:* For what if he should persuade the plaintiff's procurator to allow him to be acquitted in an action or if by lying, he should obtain money from his tutor or if he should perform some similar act which does not require much ingenuity?

15 ULPIAN, *Edict, book 11:* Again, I think, an action is to be given against him on account of the fraud of the tutor if he has benefited, just as a defense is given [in an action by the *pupillus*]. 1. But there is doubt whether the action for fraud is given against the citizens of a municipality collectively. And I think that it certainly cannot be given on account of their fraud or malice: For what fraudulent or malicious act can they [as a body] commit? But should anything fall into their hands from the fraud or malice of those who administer the affairs of the municipality, I think that the action is to be given. However, an action for fraud on account of fraudulent or malicious acts committed by a society of decurions is given against the decurions themselves. 2. Likewise, if anything falls into the hands of the principal in consequence of his procurator's fraud or malice, the action for fraud is given against the principal to the extent of what he has acquired. For there is no doubt at all that the procurator is liable on account of his own fraud or malice. 3. In this action it should be stated by whose fraud or malice the act in question has been done, although this is not necessary in the case of duress.

16 PAUL, *Edict, book 11:* Likewise, the praetor requires an express statement of what has been done with fraudulent or malicious intent. For the plaintiff ought to know in what respect he has been cheated nor, in the case of so serious a charge, ought he to be too imprecise.

17 ULPIAN, *Edict, book 11:* If several persons have acted fraudulently or maliciously and one has made *restitutio*, all are freed. Moreover, if one has paid compensation to the extent of the loss, I still think that the rest are freed. 1. This action is given against the heir and other successors to the extent of what falls into their hands.

18 PAUL, *Edict, book 11:* At the discretion of the judge, *restitutio* is also included in this action and, unless *restitutio* is made, condemnation follows to the extent of the loss. Therefore, a fixed sum is not inserted either in this action or in that on the ground of duress, so that the defendant can be condemned on account of his disobedience for as much as the plaintiff in the action should swear. But by authority of the judge a restraint ought to be placed upon the oath in both actions by the inclusion of a clause specifying the upper limit

of the amount which the defendant might be condemned to pay. 1. Yet the relief to be given in this action is not always at the discretion of the judge. For what if it is obvious that *restitutio* cannot be made (for example, if a slave transferred [to the defendant] through the latter's fraud or malice has died)? Hence, the defendant ought forthwith to be condemned to the extent of the plaintiff's interest. 2. If the owner of a block of apartments in which the usufruct has been left as a legacy should set fire to it, there is no action for fraud since other actions arise on these facts. 3. In the case of one who knowingly lent incorrect weights for the seller to weigh out goods to the buyer, Trebatius gave an action for fraud. But if he lent weights which were too heavy, the excess amount of goods can be recovered by a *condictio*; if they were too light, the goods still due can be recovered by the action on sale, unless the goods were sold on condition that they be determined by means of these particular weights and the lender, intending to deceive, asserted that he had correct weights. 4. Where someone with fraudulent or malicious intent contrives that a right of action is lost in that the time in which it might lawfully be brought has passed, Trebatius says that the action for fraud is to be given not to effect *restitutio* at the discretion of the judge but to allow the plaintiff to obtain the extent of his interest that this should not have happened, lest, if a different course were followed, there might be fraudulent circumvention of the statute. 5. If a third person kills a slave whom you have promised to me, most jurists rightly think that I am to have the action for fraud against him, because you have been freed from your obligation to me; and so the Aquilian action is denied you.

19 PAPINIAN, *Questions, book 37:* If a guarantor under a promise to deliver an animal kills it before default [on the part of the promisor], Neratius Priscus and Julian held that the action for fraud ought to be brought against him, since the debtor has been freed from his obligation and in consequence he himself is also released.

20 PAUL, *Edict, book 11:* Although your slave was in debt to you and was not solvent, he borrowed money from me at your request and paid it to you. Labeo says that the action for fraud is to be given against you because the action on the *peculium* is ineffective since there is nothing in the *peculium*; nor does it seem as though anything has been applied to the benefit of the master, since he received the money on account of what was owed to him. 1. If you persuade me that there is no partnership between you and one whose heir I am and for this reason I allow you to be acquitted in an action, Julian writes that the action for fraud is to be given to me.

21 ULPIAN, *Edict, book 11:* But if on my application you swear an oath and are acquitted and afterward it is shown you have committed perjury, Labeo says that the action for fraud is to be given against you. However, Pomponius says that by means of the oath the action is held to have been compromised, an opinion which Marcellus also affirms in the eighth book of his *Digest*. For religious scruples determine that one ought to abide by the position [created by the oath].

22 PAUL, *Edict, book 11:* In fact, the penalty for perjury is applicable.

23 GAIUS, *Provincial Edict, book 4:* If a legatee to whom more has been left than is permitted by the *lex Falcidia* persuades the heir, still ignorant of the value of the inheritance, by voluntarily swearing an oath or by some other trick, that the inheritance was amply sufficient to pay the legacies in their entirety and in that way obtained the whole legacy, the action for fraud is given.

24 ULPIAN, *Edict, book 11:* If, through the fraud or malice of a person who spoke on behalf of one who was bringing a claim to freedom, it should happen that when a decision in favor of liberty was made, the other party was absent, I think that the action for fraud is straightaway to be given against him, because, once a decision in favor of liberty has been pronounced, it cannot be revoked.

25 PAUL, *Edict, book 11:* When I claimed money from you and issue was joined on that account, you falsely persuaded me that you had paid the money in question to my slave or procurator and in that way you contrived, with my consent, to be acquitted. When we asked whether the action for fraud ought to be given against you, it was decided that it was not available because I can receive help in another way. For I can bring my

action again, and if the defense of *res judicata* is raised, I can lawfully employ a rejoinder.

26 GAIUS, *Provincial Edict, book 4:* The proconsul promises that he will give this action against the heir to the extent that property has fallen into his hands, that is, to the extent that the inheritance reaching the heir has profited from that property,

27 PAUL, *Edict, book 11:* or that he has fraudulently or maliciously contrived that such property does not fall into his hands.

28 GAIUS, *Provincial Edict, book 4:* And so if there has been a formal release of money owed by you, in all circumstances an action lies against your heir. But if property has been delivered to you, certainly if that property is still in existence on your death, an action lies against your heir; if it is not, no action lies. But in any case it is given against the heir without limit of time because he ought not to profit from another's loss. In accordance with this, an *actio in factum* is given without limit of time also against the person himself who committed the fraudulent or malicious act to the extent that he has profited.

29 PAUL, *Edict, book 11:* Sabinus thinks that the heir is sued for financial reasons of profit and loss rather than on account of his own wrongdoing, and that he does not in fact incur *infamia* and, therefore, that he ought to be liable without limit of time.

30 ULPIAN, *Edict, book 11:* Nor where the plaintiff or defendant is the heir, will an investigation of the cause be necessary.

31 PROCULUS, *Letters, book 2:* Should anyone induce my slaves to move away from possession, possession is certainly not lost, but an action for fraud lies against him if I have sustained any loss.

32 SCAEVOLA, *Digest, book 2:* A son was requested to manumit after a certain time a slave left to him as a legacy *per praeceptionem*, provided that he had rendered accounts relating to himself and his co-heirs who were his brothers. Before the due time and before he had rendered accounts, he freed the slave by manumitting him *vindicta*. The question is asked whether he is liable to his brothers on the ground of the *fideicommissum* in that he is required to render accounts concerning their shares. I replied that since he had freed the slave, he was not indeed liable on the ground of the *fideicommissum*, but, if he had hastened the manumission in order to prevent the rendering of accounts to his brothers, they can bring against him the action for fraud.

33 ULPIAN, *Opinions, book 4:* An opponent brought an action disputing the ownership of property which the possessor had for sale and, after he had destroyed the opportunity of selling it to a [prospective] buyer, abandoned his action. It was decided that the possessor had an *actio in factum* on this account to recover his financial loss.

34 ULPIAN, *Sabinus, book 42:* Where you have allowed me to take stone from your land or dig for clay or sand and I have incurred expense on this account and then you do not allow me to remove anything, no action other than that for fraud will lie.

35 ULPIAN, *Edict, book 30:* If anyone after the death of the testator has destroyed the tablets of the will deposited with him or in some other way damaged them, the instituted heir has the action for fraud against him. Further, the action for fraud is to be given to those who have been bequeathed legacies.

36 MARCIAN, *Rules, book 2:* If two persons have acted with a fraudulent or malicious intent, they cannot bring the action for fraud against each other.

37 ULPIAN, *Sabinus, book 44:* What a seller says by way of praise is to be understood as though he had made neither a definite assertion nor a promise. But if what he said was intended to deceive the buyer, it must equally be held that no action for contravention of what has been asserted or promised arises, but only the action for fraud.

38 ULPIAN, *Opinions, book 5:* A certain debtor contrived that a letter be sent to his creditor purporting to be from Titius and requesting that he himself should be freed. The creditor, deceived by this letter, freed the debtor by an Aquilian stipulation and formal release. Afterward, when the letter has been discovered to be forged or pointless, the creditor, if over twenty-five, has the action for fraud but, if under, *restitutio in integrum.*

39 GAIUS, *Provincial Edict, book 27:* If you have presented yourself to Titius as defendant in an action relating to property which you do not possess, in order to allow another to usucapt it, and have given security that the amount due under the judgment will be paid, although you have been acquitted, you will still be liable for fraud; and so Sabinus decided.

40 FURIUS ANTHIANUS, *Edict, book 1:* One who deceived someone and so induced him to enter upon a bankrupt inheritance is liable for fraud, unless perchance he was a creditor and the only one; for then the defense of fraud against him is sufficient.

4

PERSONS UNDER TWENTY-FIVE

1 ULPIAN, *Edict, book 11:* The praetor following natural equity has issued this edict in which he has undertaken the protection of *minores.* For since all agree that persons of this age are weak and deficient in sense and subject to many kinds of disadvantage the praetor has promised them relief in this edict and help against imposition. 1. The praetor says in the edict: "With respect to what is alleged to have been done by a person under twenty-five, I shall treat the case as the circumstances demand." 2. It is evident that he offers help to those under twenty-five. For it is agreed that after this age the strength of a full-grown man is reached. 3. And, therefore, today, up to this age, young men are governed by curators and under this age the administration of their own property should not be entrusted to them, even though they might be able to look after their own affairs well.

2 ULPIAN, *Lex Julia et Papia, Book 19:* Nor through the birth of children do they receive their property more quickly from their curators. For the provision of the statutes that one year is remitted for every child relates, the divine Severus says, to the holding of office not to the receiving of their property.

3 ULPIAN, *Edict, book 11:* In point of fact, the divine Severus and our emperor have interpreted decrees to the same effect of consuls and governors as though they were issued from motives of personal interest and, moreover, have very rarely themselves, by the exercise of their exceptional power, allowed *minores* to administer their own property; and we adopt the same rule. 1. If anyone makes a contract with a *minor* which will take effect at a time when he has become adult, do we look at its beginning or end? And it is settled, as has also been laid down by a constitution, that if anyone having become adult should ratify what he had done as a *minor, restitutio* is not applicable. On this Celsus has a not inappropriate discussion in the eleventh book of his *Letters* and the second book of his *Digest* about a case on which he was consulted by the praetor Flavius Respectus. Someone under twenty-five, perhaps in his twenty-fourth year, brought the action on tutelage against the heir of his tutor. Soon afterward, according to the statement of the case, the heir of the tutor was acquitted (the *minor* having already attained the age of twenty-five before the conclusion of the action). *Restitutio in integrum* is sought. Upon this Celsus advised Respectus that *restitutio* could not readily be granted to the person who had been a *minor* but only if he showed that his adversary had cunningly contrived to be acquitted after he had become adult. For, he says, this *minor* is held to have been deceived not just with reference to the last day of the action, but only if the whole affair has been arranged with the object of securing the acquittal of the heir after he, the *minor,* had become adult. The same jurist nevertheless acknowledges that if the suspicion that his opponent has

behaved fraudulently or maliciously is slight, the *minor* ought not to receive *restitutio in integrum*. 2. I know also that the following case once occurred. Someone under twenty-five involved himself in the paternal inheritance and, having become adult, claimed some payment from his father's debtors and then sought *restitutio in integrum* with the object of repudiating the inheritance. An objection was raised on the ground that when he had become adult, he had ratified what he had decided when a *minor*. Nevertheless, we thought that regard should be had to the beginning of the affair and that *restitutio in integrum* should be granted. I think that the same holds even should he have entered upon the inheritance of someone not a relative. 3. Moreover, in the case of someone under twenty-five, it must be seen whether we say he remains a *minor*, even on his birthday, up to the hour on which he was born, with the result that if he has been put to a disadvantage, *restitutio* may be made. And since he has not yet completed [the full period], it must be said that the time is to be looked at from instance to instance. Equally, where he was born during the *bisextus*, Celsus writes that it makes no difference whether he was born on the earlier or the later day for the two-day period is held to be one day and the later day is intercalated.[1] 4. Next it must be seen whether relief ought to be given to heads of households only or also to sons-in-power. The doubtful point is this. Suppose that someone should say that relief should also be given to sons-in-power with respect to their *peculium*, the result would be that through them relief was also given to adults, that is, to their fathers, and this by no means was the praetor's intention; for the praetor promises help to *minores*, not adults. But I think that the most correct opinion is given by those who think that a son-in-power can obtain *restitutio in integrum* only in those cases in which he himself has an interest, for example, if he has incurred an obligation. Accordingly, if on his father's order, he has incurred an obligation, the father certainly can be sued for the whole. But since the son himself can also be sued, whether he remains in power or even has been emancipated or disinherited, though in the latter cases only to the extent of his resources—indeed, if he remains in power he can be sued on a judgment even against the father's wishes—he ought to obtain relief if he is himself sued. But let us see whether such help also benefits the father, as it is usual for it to benefit at times a guarantor of the son. And I do not think that the father will be able to benefit. Therefore, if the son is sued, he may request help; if a creditor sues the father, help is not available. An exception is made in the case of a loan for consumption. For in this case, if he received money as a loan on his father's orders, he will not obtain help. Likewise, even if, without his father's orders, he has made a contract and been overreached, certainly if the father is sued on the *peculium*, the son is not to be granted *restitutio*; if the son is sued, he can be given *restitutio*. Nor are we troubled by the fact that possession of a *peculium* is in the interest of the son. For it is more to the interest of the father than of the son, although in some cases the *peculium* is the concern of the son, for example, where the imperial treasury has taken possession of his father's goods on account of a debt; since, in accordance with a constitution of Claudius, the *peculium* was set aside for the son. 5. Therefore, I think that even a daughter-in-power can be granted *restitutio in integrum* where she has been put at a disadvantage with respect to the dowry by agreeing that her father, some time after he gave it, stipulate for its return or employ another to stipulate for it, since the dowry is the particular property of the daughter herself. 6. If someone under twenty-five gave himself into *adrogatio* and alleges that he was deceived in the matter of the *adrogatio* itself (suppose, for instance, that he was a person of property and had been adrogated by someone intending to rob him), I hold that his application for *restitutio in integrum* should be entertained. 7. If anything was left by way of a legacy or a *fideicommissum* to a son-in-power who is a *minor* [to be paid] after his father's death and he has been imposed upon, perhaps in that he consented to his father making a pact that the legacy should not be claimed, it can be said that *restitutio in integrum* should be granted since the son himself has an interest on account of the expectation of the legacy which falls to him on his father's death. Again, if something has been left to him as a legacy which is personal to him, for example, a military command, it is to be said that he can obtain

1. A *bisextus* is an intercalary day: to keep the calendar right the twenty-fourth of February was doubled every fourth year.

restitutio in integrum. For it is in his interest not to be deprived of it, since he did not acquire it for his father but had it for himself. 8. Further, where a *minor* has been instituted heir on condition that he is emancipated by his father within a hundred days and he omitted to inform his father of this, although he should and, in fact, could have done so quickly and his father would have emancipated him if he had known, it must be said that he can obtain *restitutio in integrum,* if his father is prepared to emancipate him. 9. Pomponius adds that the father also can obtain an investigation in the name of his son on the latter's death, as though he were heir, with respect to those matters for which a son-in-power in relation to his *peculium* may obtain *restitutio in integrum.* 10. But should there be a son-in-power who has a *peculium castrense,* there is no doubt at all that *restitutio in integrum* will be granted in matters relating to the *peculium castrense* just as though he had suffered a loss with respect to his own property. 11. However, a slave under twenty-five can in no way obtain *restitutio,* since the person of his master is considered and he has himself to blame for entrusting the matter to a *minor.* Therefore, the same must also be said if a contract has been made by an *impubes,* as Marcellus also writes in the second book of his *Digest.* Further, should perhaps the free administration of a *peculium* have been entrusted to a slave who is a *minor,* his master who is adult may not obtain *restitutio* on this ground.

4 AFRICANUS, *Questions, book 7:* For whatever act a slave should perform, he is understood to have acted in accordance with the wishes of his master. And this will be the more evident either if there is a question of the action for a business manager's conduct or if it is alleged that a person over twenty-five has given a mandate to a *minor* to undertake some affair and the latter has been deceived with respect to it.

5 ULPIAN, *Edict, book 11:* Nevertheless, should someone be a slave to whom immediate freedom under a *fideicommissum* is due and should he have been deceived through being subjected to a delay, it could be said that the praetor ought to provide him with relief.

6 ULPIAN, *Edict, book 10:* Help is given those under twenty-five by means of *restitutio in integrum* not only when they have suffered a loss to their property but also where it is in their interest not to be troubled by litigation and expense.

7 ULPIAN, *Edict, book 11:* The praetor says: "[What] is alleged to have been done." We understand "done" to apply irrespective of what has happened whether a contract has been made or something else has occurred. 1. Accordingly, if a *minor* buys something, sells, enters into a partnership, borrows money, and has been put to a disadvantage, he will receive relief. 2. Again, if money is paid to him by a debtor of his father or of his own and he has lost it, it must be said that he will receive relief on the ground that there has been some transaction with him. And, therefore, if a *minor* sues a debtor, he ought to have curators present in order that the money be paid to him, else there is no compulsion to pay him. But today money is generally deposited in a temple, as Pomponius writes in his twenty-eighth book, both in order to relieve the debtor from bearing any longer the burden of interest and to prevent the creditor who is a *minor* losing the money, or it is paid to curators if there are any. There is also an imperial constitution, which allows a debtor to compel a young person to secure the appointment of curators. Yet what is the position if the praetor orders the debtor to pay the money to the *minor* without curators and he pays? Is the debtor protected? There is room for doubt here. However, I think that if the person alleging that the other is a *minor* has been compelled to pay, no further charge can be placed on him, unless perhaps anyone should think that he must appeal on the ground that the judgment constitutes a wrong. But I believe that the praetor would not be prepared to hear such a *minor* who wished to obtain *restitutio in integrum.* 3. Moreover, not only does a *minor* receive help in these cases but also where he intervenes on behalf of another, as where he places himself or his property under an obligation by way of guarantee. Further, Pomponius seems to agree with those who distinguish between the case where he has been approved by an *arbiter* appointed in order to approve guarantors and the case in which he has been approved only by his opponent himself. However, it seems to me that in both cases relief will have to be given if he is a *minor* and shows that he has been overreached. 4. Again, a *minor* receives relief in respect of actions whether he has been put to a disadvantage as plaintiff or as defendant. 5. Again, if a *minor* enters upon an inheritance which gives

him too little gain, he will receive help in order to enable him to repudiate; for he has here suffered a loss. The same applies in the case of *bonorum possessio* or other mode of succession. Moreover, not only a son who has involved himself in the paternal inheritance but also any member of the household who is a *minor* will obtain *restitutio* in a similar fashion, for example, a slave who is instituted heir and given his freedom. For it must be said that if he has involved himself, he can receive help on account of the privilege accorded to his youth to enable him to keep his property separate. Certainly, one who receives *restitutio* after entry upon the inheritance ought to be liable if any property belonging to the inheritance falls into his hands and has not been lost through foolishness due to his age. 6. Today we employ a definite rule that even where they fail to make a gain, *minores* receive relief. 7. Pomponius also writes in his twenty-eighth book that a *minor* ought to receive relief even if he has declined a legacy without fraud or malice on anyone's part or, when bequeathed a choice of property as a legacy, has chosen the worse and so suffered loss, or if he has promised to someone one or other of two things and gave the more valuable. In these cases relief is to be provided. 8. Arising out of what has been said, that in the case of failure to make a gain relief is also to be afforded a *minor*, the question is raised, where property of his is sold and someone appears prepared to bid more, is there to be *restitutio in integrum* on account of the possible gain? In this sort of case, the praetors daily grant *restitutio* and permit fresh bidding. They also do the same in the case of property which ought to be kept safe for the *minor*. However, their intervention must be cautious, else no one would enter upon the purchase of property belonging to a *pupillus* even if it is sold in good faith. Further, strong approval should be accorded the rule that where property has been exposed to accidents, in such a case no help is to be given the *minor* against the buyer unless either corruption or manifest bias is shown on the part of tutors or curators. 9. Moreover, if, after *restitutio* has been granted, the *minor* involves himself in the inheritance or enters upon one which he had declined, he can again be granted *restitutio* to enable him to repudiate. And this decision has been the subject both of rescripts and opinions. 10. But as to the statement of Papinian in the second book of his *Opinions* that a slave substituted as *heres necessarius* to a *minor* will become *heres necessarius* if the *minor* in fact repudiates the inheritance and will nevertheless remain free if the *minor* should be granted *restitutio* [and so obtain the inheritance], but that if the *minor* has first entered upon the inheritance and then repudiated it the slave substituted to the *pupillus* and given his freedom can be neither heir nor free, this is not correct in all particulars. For if the inheritance is bankrupt and the heir abstains, both the deified Pius and our emperor have provided by rescript that indeed in a case of a *pupillus* who is *heres extraneus* there will be place for the substitute as *heres necessarius*. As to his statement that the slave remains free, this is to be understood as implying that he does not also remain heir, in the case where the *pupillus* obtains *restitutio* after he has abstained. Yet since the *pupillus* does not become heir but has *utiles actiones*, without doubt he [the slave] who was once heir will remain heir. 11. Likewise, if a *minor* has not appealed within the due time, he is granted help so that he may appeal; for one supposes this to be what he wishes. 12. Likewise, if judgment is given against a *minor* for failure to appear in an action, he receives help. Moreover, it is agreed that in such a case men of all ages are to be restored to their former position, if they show that they were absent for a lawful reason.

8 HERMOGENIAN, *Epitome of Law, book 1:* Even if a *minor* has been condemned on the ground of contumacy, he may seek the help of *restitutio in integrum.*

9 ULPIAN, *Edict, book 11:* If on the ground of a judgment the goods of a *minor* have been seized and sold and shortly afterward *restitutio* has been obtained against the decision of the governor or imperial procurator, it is to be seen whether the goods sold ought to be restored. For it is certain that money paid on the ground of a judgment is to be restored to him. But he has an interest in obtaining the goods themselves rather than their value. And I think that sometimes *restitutio* is to be allowed, that is, if the loss to the *minor* is considerable. 1. Also in relation to the amount of the dowry, help is afforded a woman if she has been cheated into giving as dowry more than her resources will stand or her whole prop-

erty. 2. Now it must be seen whether in the case of contracts only a *minor* who has been put to a disadvantage receives help or whether even one who has done wrong is also helped. For example, if a *minor* has acted fraudulently or maliciously with respect to property deposited with, or lent to, him or in connection with some other contract, is he to receive help if nothing falls into his hands? And it is settled that where a *minor* has committed a delict, he is not to receive help, and so he is not helped in the cases put. For if he has committed theft or wrongfully damaged someone's property, he is not helped. But if, where damage to property had occurred, he could have confessed so as to avoid liability for double damages and yet preferred to deny liability, he is given *restitutio* only to the extent of being deemed to have confessed. And similarly, if he could have reached a settlement as to what he should pay as a thief rather than suffer the action for double or fourfold damages, he receives help. 3. If a woman after being divorced through her own fault wishes to receive help or a husband in like position, I think *restitutio* is not to be had as this is no light offense. For if a *minor* has committed adultery, he does not receive help. 4. Papinian says that if someone between the ages of twenty and twenty-five allows himself to be sold into slavery, that is, if he has shared in the price, *restitutio* is generally not granted. This is correct since a matter does not allow *restitutio* when there is a change of status. 5. If a *minor* is alleged to have committed a revenue offense, there will be *restitutio in integrum*. This is to be understood to hold provided that there has been no fraud or malice on the part of the *minores* themselves; otherwise *restitutio* is not applicable. 6. It is impossible even for a *minor* to receive help from the praetor that would prejudice someone's freedom,

10 PAUL, *Edict, book 11:* unless this has been obtained from the emperor for a weighty reason.

11 ULPIAN, *Edict, book 11:* But there will be either an action for fraud or a *utilis actio* in respect of the interest of the *minor* that a slave is not manumitted. Accordingly, whatever the former would have had if he had not manumitted is now to be paid to him. Again, where a slave on manumission had kept for himself property belonging to his master, there will lie against him on this account the actions for production and theft and a *condictio*, of course, since after manumission he has handled the objects. But where he committed the delict against his master while he was a slave, no action lies against him after he has become free. And this is provided in a rescript of the deified Severus. 1. What if someone under twenty-five but over twenty has sold a slave on condition that he be manumitted? I have put a case of someone over twenty since Scaevola writes in the fourteenth book of his *Questions*, and this is the better opinion, that the ruling expressed in the constitution of the deified Marcus to Aufidius Victorinus does not include this case. Therefore, it must be seen whether someone over twenty is to receive help. And, indeed, if he should seek help before the slave attains freedom, he will be heard, but if afterward, he cannot. Likewise, the question can be raised, if the buyer under this condition is a *minor*, whether there can be *restitutio*? And if, indeed, the slave has not yet obtained freedom, it will have to be said that he will be given help if after the due date [for manumission] the intention of the seller who is over twenty bestows freedom. 2. A question is raised on the following facts: Certain young people accepted as curator someone called Salvianus. After discharging his duties [for a period], he obtained by favor of the emperor a civic procuratorship and obtained from the praetor, in the absence of the young persons, an order excusing him from their care. They approached the praetor and sought *restitutio in integrum* against Salvianus, because he had been excused in contravention of the relevant constitutions. For since it is not usual to give up a tutelage once undertaken, except where one is abroad on state business or occupied with the affairs of the emperor, as was permitted in the case of Menandrus Arrius, a member of the emperor's council, and, despite this, Salvianus had been released from his duties, the young people sought *restitutio in integrum* from the praetor on the ground that they had been put to a disadvantage. Because Aetrius Severus was in doubt, he referred the case to the Emperor Severus. In reply to this request, the latter issued a rescript to Venidius Quietus, the successor of Aetrius Severus, to the effect that there was no ground for the intervention of the praetor, as it had not been alleged that a contract had been made with someone under twenty-five, but that the emperors will intervene and require Sal-

vianus, who had wrongly been excused by the praetor, again to undertake the administration. 3. However, it is to be known that not in all cases do *minores* receive help, but only on cause being shown if they are alleged to have been put to a disadvantage. 4. Likewise, there may be no *restitutio* in the case of a person who administers his property prudently and suffers loss not through lack of care but through an act of fate and wishes for *restitutio*. For it is not the fact of loss which provides a ground for *restitutio* but lack of care and deliberation. And so Pomponius writes in his twenty-eighth book. Hence, Marcellus, in a note on Julian, says that if a *minor* buys for himself a slave whom he requires and then the slave dies, he ought not to be granted *restitutio*, for he has not been put to a disadvantage where he buys a slave essential to him, although he is mortal. 5. If a *minor* was heir to a wealthy person and suddenly the value of the inheritance collapses (for example, estates have been destroyed through the cracking apart of the earth, apartment houses have been destroyed by fire, slaves have fled or died), certainly Julian, in his forty-sixth book, speaks as though the *minor* could receive *restitutio in integrum*. However, Marcellus, in a note on Julian, says that *restitutio in integrum* is not applicable; for in entering upon a rich inheritance, he has not been put to a disadvantage through youthful lack of care, and what happens by act of fate could happen to any head of household however diligent. But a situation of this sort can lead to *restitutio* for the *minor* if he has entered upon an inheritance in which there is much perishable property or land with buildings charged, however, with considerable debt, or he did not anticipate the possibility of slaves dying and land being ruined, or he has not sold quickly property subject to many accidents. 6. Likewise, the question is raised, if a *minor* seeks *restitutio* against a *minor*, is he to be heard? And Pomponius simply writes that there is to be no *restitutio*. However, I think that the praetor should investigate who has been put to a disadvantage. Accordingly, if both have been put to a disadvantage, for example, a *minor* lent money to a *minor* and he lost it, in Pomponius's view the one who received the money and wasted or lost it has the better case. 7. Certainly, if a *minor* makes a contract with an adult son-in-power, both Julian, in the fourth book of his *Digest*, and Marcellus, in the second book of his *Digest*, write that there can be *restitutio in integrum* so that more account is taken of age than of the *senatus consultum* [Macedonianum].

12 GAIUS, *Provincial Edict, book 4:* If a woman has intervened in the affairs of a *minor* on behalf of another, he [the *minor*] is given no action against the woman but, in the same way as others, ought to be helped by means of a defense; of course, because under the ordinary law he obtains *restitutio* with respect to the action against the original debtor. This is so if the latter is solvent, otherwise the woman may not obtain the relief provided by the *senatus consultum* [Velleianum].

13 ULPIAN, *Edict, book 11:* A relevant question in the investigation of cause is whether the *minor* alone is to receive help or also those who have incurred an obligation on his behalf, for example, guarantors. Therefore, if I knew that someone was a *minor* and did not trust him and then you entered into a guarantee on his behalf, it is not fair that the guarantor receives help to my detriment but rather the action on mandate is to be refused him. In sum, the praetor will have to give careful consideration to whom he would rather help, creditor or guarantor; for the *minor* who has been put to a disadvantage will be liable to neither. It will more readily be said that the praetor ought not to help the mandator for he was, as it were, advocate and persuader for a contract with the *minor*. Hence, the question can be examined whether the *minor* ought to ask for *restitutio in integrum* against the creditor or against the guarantor as well. And I think that it is safer to ask for it against each. For *restitutiones* are to be given careful consideration on cause being shown and in the presence of the parties or in their absence, if due to contumacy. 1. Moreover, at times *restitutio* even *in rem* is granted to a *minor*, that is, against the possessor of his property although no contract has been made with him. For example, you have bought an object from a *minor* and sold it to someone else. At times he can obtain *restitutio* against the

possessor, in order that he does not lose his own property or is not without it; and this is achieved either through an investigation by the praetor or through rescission of the transfer and the grant of an action *in rem*. Pomponius also, in his twenty-eighth book, writes that Labeo thought, where someone under twenty-five sold and delivered a piece of land and the buyer transferred it again, certainly if the subsequent buyer knows that this is what has happened, that *restitutio* is to be granted against him. If he did not know and the first buyer is solvent, *restitutio* is not to be granted. But if the latter was not solvent, it is more equitable that the *minor* receive help even against the one who did not know, although he is a buyer in good faith.

14 PAUL, *Edict, book 11:* Certainly, as long as one who receives property from a *minor* or his heir is solvent, no new step is to be taken against the person who bought the property in good faith, and Pomponius also writes this.

15 GAIUS, *Provincial Edict, book 4:* But where *restitutio* is given, the subsequent buyer can have recourse against his seller. The same rule also applies if the property has been bought and sold several times.

16 ULPIAN, *Edict, book 11:* Also relevant to the investigation of cause is the question whether perhaps any action could lie other than *restitutio in integrum*. For if a *minor* is protected by ordinary remedies and the normal law, extraordinary relief ought not to be given to him as, for example, where a contract has been made with a *pupillus* without the authority of his tutor and the former has not profited. 1. Likewise, Labeo states that if a *minor* has been cheated and entered into a partnership, even, for instance, where the entry is gratuitous, there is no partnership nor would there be even if the parties were adult and thus the praetor has no reason to intervene. And Ofilius gives a like opinion; for it is enough that the ordinary law protects the *minor*. 2. Pomponius also states in his twenty-eighth book that where a certain heir was asked to give several things to his brother's daughter on condition that if she died without children, she would restore those things to the heir and she, after the death of the heir, gave an undertaking to his heir that she would restore them, Aristo thought that there was to be *restitutio in integrum*. But Pomponius adds this, that the *cautio* could found a *condictio* for an uncertain amount of damages on the part even of an adult; for he is protected not by the ordinary law but by a *condictio*. 3. And generally the rule is to be approved that where a contract is not valid, the praetor ought not to interfere if this is clear. 4. Pomponius also says that as regards the price in purchase and sale, the contracting parties are in the course of nature allowed to overreach each other. 5. Now it is to seen who can grant *restitutio in integrum*. Both the urban prefect and other magistrates within the limits of their jurisdiction can grant *restitutio in integrum*, both in relation to decisions of others and against their own decisions.

17 HERMOGENIAN, *Epitome of Law, book 1:* The praetorian prefects can also grant *restitutio in integrum* in a matter arising from their own decision although there can be no appeal from them. The reason for this distinction is that an appeal in fact is a complaint brought against a wrong decision; but *restitutio in integrum* is a petition for pardon on account of the petitioner's own error or an allegation of deceit on the part of an opponent.

18 ULPIAN, *Edict, book 11:* However, an inferior magistrate cannot grant *restitutio* against the decision of a superior 1. Further, if the emperor has pronounced a decision, he very rarely allows *restitutio* and gives a hearing to someone who alleges that he has been put to a disadvantage through youthful lack of understanding, while points in favor of his case had not been mentioned, or complains that he has been betrayed by advocates. Indeed, the deified Severus and the emperor Antoninus did not hear Glabrio Acilius when, without alleging a reason, he sought *restitutio* against his brother after they had heard and determined his case. 2. However, when Percennius

Severus sought *restitutio in integrum* in respect of matters which had been the subject of two judgements, the deified Severus and the emperor Antoninus allowed these matters to be raised in their court. 3. The same emperor issued a rescript to Licinnius Fronto stating that it was not customary, after sentence had been given by a judge acting on behalf of the emperor, for anyone other than the emperor to grant *restitutio*. 4. Again, if a judge appointed by the emperor hears a case, *restitutio* cannot be granted by anyone other than the emperor who appointed the judge. 5. *Restitutio in integrum* is granted not only to *minores* but also to their successors, although they are themselves adult.

19 ULPIAN, *Edict, book 13:* Yet at times we will allow a successor more than a year [in which to obtain *restitutio*], as has been stated in the edict, where, for example, his age should happen to provide a ground for relief; for after his twenty-fifth year he will have the time established by law. For he is held to have been put to a disadvantage by the very fact that although he could have received *restitutio* on the basis of the deceased's claim within the time established, he did not seek it. Certainly, if the deceased had a brief period left of the year calculated with allowance for holidays in which to obtain *restitutio in integrum*, we grant to his heir, if a *minor*, after completion of his twenty-fifth year not the whole of the time established but only that period which the person whose heir he is had left to him.

20 ULPIAN, *Edict, book 11:* Papinian, in the second book of his *Replies*, says that the time established for *restitutio in integrum* ought not to be extended in favor of a returned exile, on the ground that he was away, since he could have approached the praetor by means of a procurator and did not do this, or have approached the governor of the place where he was. But Pomponius is not correct in saying that he does not deserve relief on account of the penalty which has been imposed. For what does a delict have in common with the indulgence accorded youth? 1. Yet if anyone over twenty-five has joined issue in an action within the time available for *restitutio* and afterward abandons the action, joinder of issue will not avail him in order to obtain *restitutio in integrum*, as has frequently been laid down by rescript.

21 ULPIAN, *Edict, book 10:* However, a person is not held to have discontinued an action when he has adjourned it, but only when he has abandoned it altogether.

22 ULPIAN, *Edict, book 11:* Indeed, where *restitutio in integrum* has been sought in relation to an entry upon an inheritance made by a *minor*, neither what he has paid out in fulfillment of legacies nor the value of slaves who attained freedom as a result of his entry are to be refunded by the *minor*. Just as, conversely, when a *minor* obtains *restitutio* in order to enter upon an inheritance, Severus and Antoninus in a rescript to Calpurnius Flaccus stated that acts previously done by the curator of the property, under decree of the praetor, in selling the property in accordance with the procedure established by law, were to be held valid.

23 PAUL, *Edict, book 11:* When on the mandate of his father a son-in-power administered property, he does not have the right of *restitutio*. For even if someone else had given him a mandate, he would not receive help since to give such help would rather be to consult the interests of the adult who would suffer the loss if the property ceased to exist. But if in fact it would be the *minor* who suffered loss because he cannot recover what he has paid from the person on whose affairs he was engaged, as the latter was insolvent, without doubt the praetor may intervene. Moreover, if the principal himself is a *minor* but the procurator an adult, the former cannot readily be heard unless the act in question was done at his mandate and he cannot recover from the procurator what he has lost. Therefore, even if the *minor* has been overreached in the capacity of procurator, this ought to be deemed the fault of the principal who entrusted his affairs to a person of his age. And Marcellus also decided this.

24 PAUL, *Views, book 1:* But if a *minor* of his own accord has intervened in the affairs of an adult, he will have to receive *restitutio*, so that loss does not befall the adult. But if he has refused to do this, then if he has been sued by the action for unauthorized administration, he will not receive *restitutio* against this action, but he is to be compelled to cede to the adult his right to the help afforded by *restitutio in integrum* with the result that he constitutes the latter procurator on his own behalf, so that he can by this means recover compensation for the loss befalling him on account of the *minor*. 1. However, it is not always the case that transactions concluded with *minores* are to be rescinded, but they are to be considered in the light of what is sound and equitable so that persons of this age do not suffer great inconvenience in that no one enters into a contract with them and dealings with them are, so to speak, forbidden. Therefore, unless either there is manifest deceit or they have been extremely careless in the particular case, the praetor ought not to intervene. 2. Our Scaevola said: "If anyone under the influence of youthful levity omits to take or rejects an inheritance or *bonorum possessio*, certainly if nothing had been done, in all circumstances he is to be heard. But if the inheritance has already been sold, the affair concluded, and he seeks the money obtained by the work of the substitute heir, his application is to be rejected. And the court should exercise a much greater degree of caution in granting *restitutio* to the heir of a *minor* on this ground." 3. If a slave or son-in-power has cheated a *minor*, the father or master is to be ordered to make *restitutio* of what has fallen into his hands and to pay out of the *peculium* what he has not himself acquired. If satisfaction is obtained from neither course and there has been fraud or malice on the part of the slave, he is to be either flogged or given in noxal surrender. But if a son-in-power has done this, he will be condemned on account of his own fraud or malice. 4. *Restitutio*, however, is to be made in such a way that each is again placed in his original legal position. Therefore, if in a sale of land a *minor* has been cheated and *restitutio* has been granted, the praetor orders the buyer to return the land together with the fruits and get back the price unless, when he paid, he was not unaware that the *minor* would squander it, just as happens in the case of money which he has lent to a person intending to spend it. But more caution is exercised in the case of sale because payment of the price constitutes a debt, the discharge of which is necessary, whereas it is not necessary to make a loan. For if the contract has arisen in such a way that it is to be declared void, still, should it be necessary to pay the price, the buyer is not to be compelled in all circumstances to suffer loss. 5. No specific action or *cautio* arises from this edict; for all this depends on the praetor's investigation.

25 GAIUS, *Provincial Edict, book 4:* There is no doubt that if a *minor* has paid what he did not owe on a ground for which at civil law there is no right to recover, an *actio utilis* is to be given him to recover, since an action for recovery is generally to be given on a lawful ground even to those over twenty-five. 1. If such a youth entitled to *restitutio* comes forward, he ought to receive it if he requests relief in person or through his procurator to whom he has given a mandate specifically for this purpose. But a person who adduces a general mandate to undertake all types of business ought not to be heard.

26 PAUL, *Edict, book 11:* But if, when *restitutio* is sought, it is doubtful whether a special mandate exists, the matter can be cured through the interposition of a stipulation that the principal will ratify what has been done. 1. But if the person who is alleged

to have deceived a *minor* is absent, the person undertaking his defense ought to lodge security for the payment of what is due under the judgment.

27 GAIUS, *Provincial Edict, book 4: Restitutio* in all circumstances is to be made to a father on behalf of a son, although the son refuses *restitutio*, because the father, who is liable under the action on the *peculium*, has the risk. From this it is apparent that other relations or relatives by marriage are in a different situation, and they ought not to be heard unless they make an application with the consent of the young person or his way of life is such that he ought properly to be forbidden even to deal with his property. 1. If a *minor* squanders money which he has borrowed, the proconsul ought to refuse the creditor an action against him. But if the *minor* lent to someone in need, no proceeding is allowed other than an order to the young person to assign to the creditor his actions which he has against the person to whom he himself had lent. Also if he bought land with the money at a higher price than he should, the rule to be applied is that the seller upon recovery of the price is ordered to take back the land so that in this way, without loss to another, the creditor can also obtain his due from the young person. From this, of course, we also learn what procedure ought to be followed if the *minor* buys with his own money at too high a price; still, in this and the previous case, the seller who has restored the price also pays the interest which he has, or could have, obtained from the money, and receives the profits to the extent that the young person has gained. Likewise, in the converse case, if a young person has sold at a price less than he ought, certainly the buyer should be ordered to restore the land together with the profits, but the young person to restore the price only to the extent by which he has profited. 2. If someone under twenty-five has without ground given a formal release to a debtor, his right of action ought to be restored not only against the debtor himself but also against his guarantors and in relation to any pledge which he had received. And if there are two debtors and he has given a formal release to one, there is to be restoration of the action with respect to both. 3. From this we learn that if he has made a novation prejudicial to himself, perhaps where he has by way of novation transferred the obligation from a solvent debtor to one without resources, he ought to receive *restitutio* with respect to the first debtor. 4. *Restitutio* also is to be made against those in respect of whom an action for fraud is not allowed, unless certain persons are excepted under a specific statute.

28 CELSUS, *Digest, book 2:* When someone under twenty-five receives *restitutio* in respect of a person against whom he has brought the action on tutelage, the tutor on this account does not obtain *restitutio* of the *judicium contrarium*.

29 MODESTINUS, *Replies, book 2:* Even if it can be shown that a *pupillus* has been put to a disadvantage in a case where he had received the authority of his tutor who was also his father, his curator, subsequently appointed, is not prevented from seeking *restitutio in integrum* on his account. 1. A *pupilla*, condemned in a case arising from the administration of her curator, wished to obtain *restitutio* with respect to one part of the judgment, and because she seems to have received relief on the other matters raised by the case, the plaintiff, an adult, who had accepted the judgment at the time said that there should be restoration of the whole action. Modestinus replied that if the part in which the *pupilla* sought *restitutio in integrum* is not connected with the other parts, no reason has been presented for hearing the plaintiff's request for rescission of the whole judgment. 2. If a *minor*, granted *restitutio* by benefit of age when none of his father's creditors was present or had been summoned by the governor to take proceedings, repudiated his father's inheritance, the question is raised whether that *restitutio* seems to have been properly granted. Modestinus replied that since it is alleged that the decree for *restitutio in integrum* was issued although the creditors had not been summoned, this should by no means operate to the prejudice of the creditors.

30 PAPINIAN, *Questions, book 3:* An emancipated son, not having received *possessio contra tabulas* (possession against the will) after setting in motion an inquiry into *restitutio*, claimed, when over twenty-five, a legacy under his father's will. He is held to have abandoned the action since, even though there was still time to obtain *bonorum possessio*, having chosen to abide by the wishes of the deceased, he is considered to have renounced the help offered by the praetor.

31 PAPINIAN, *Replies, book 9:* In a case where a woman, after she had become heir, received on account of her age *restitutio in integrum* permitting her to repudiate the inheritance, I gave the opinion that slaves belonging to the inheritance who had correctly been manumitted by her under a *fideicommissum* retained their freedom. Nor will they be compelled to pay twenty aurei in order to retain the freedom which they seemed to have acquired by the best right. For even if some of the creditors have received their money from her before *restitutio,* the claim of the others against them, that the money be shared, is not allowed.

32 PAUL, *Questions, book 1:* Someone under twenty-five, on an application to the governor, convinced him by his physical appearance that he was of full age although in fact he was not. His curators, since they knew him to be a *minor,* continued in the administration. In the period between the inquiry into his age and completion of his twenty-fifth year, money owed to the young man was paid to him and unwisely spent. I ask: "Who is to bear the risk? And what is the position if the curators had also fallen into the same mistake of thinking that he was an adult, had abstained from the administration, and even relinquished the office of curator altogether? Do they bear the risk of the period which begins to run after the decision in the inquiry relating to age?" I replied: "Those who have paid what they owed are freed by operation of law and ought not again to be sued." Certainly, curators who continued to exercise their office knowing that he was a *minor* ought not to have allowed him to receive payment of the debts and on this account ought to be sued. But if they had themselves paid attention to the governor's decree and ceased to administer or even rendered their accounts, they are in a position similar to that of the other debtors and therefore are not sued.

33 ABURNIUS VALENS, *Fideicommissa, book 6:* In a case where someone under twenty-five was requested [by will] to manumit a slave of his worth more than the property bequeathed him in the will and has accepted the legacy, Julian's opinion was that he is not to be compelled to grant freedom if he is prepared to return the legacy. Just as it is open to adults not to accept if they are unwilling to manumit, so he is released from the obligation to manumit on returning the legacy.

34 PAUL, *Views, book 1:* If someone under twenty-five has lent money to a son-in-power who is a *minor,* the person who spends the money has the better case unless he [the borrower] is found to have profited from it at the time of joinder of issue. 1. If *minores* have agreed to submit a claim to arbitration and with the authority of their tutors have stipulated [to abide by the arbiter's award] they may lawfully seek *restitutio in integrum* with respect to such an obligation.

35 HERMOGENIAN, *Epitome of Law, book 1:* Where, in a sale by auction, a *minor* loses to a higher bid made by another and seeks *restitutio,* he will be heard if it is shown that he has an interest in the purchase of the property, for example, that it was something that had belonged to his ancestors, provided that he offers the seller the difference between his own and the higher bid.

36 PAUL, *Views, book 5:* Someone under twenty-five, through the help provided by *restitutio in integrum,* can again make an averment which he had omitted [in an action].

37 TRYPHONINUS, *Disputations, book 3:* The help provided by *restitutio in integrum* is not available for the exaction of penalties and therefore the action for insult, once abandoned, cannot be brought again. 1. Again, where the period of sixty days, during which, in virtue of his right as a husband, a man can without being vexatious accuse his wife of adultery, has elapsed, *restitutio in integrum* is denied him. If now he wishes to assert the right which he had failed to exercise, what is this other than a request for pardon for a delict, that is, a vexatious accusation? And since it is a fixed rule of law that the praetor ought to provide help neither in respect of delicts nor for the benefit of vexatious accusers, *restitutio in integrum* is not available. Moreover, in

the case of delicts someone under twenty-five does not deserve *restitutio in integrum*, at least in the case of the more serious, except to the extent that at times compassion, on the ground of age, should induce the judge to impose a lighter penalty. But, when we come to the rules set out in the *lex Julia* for the punishment of adultery, certainly no request for relief against the penalty for adultery is permitted, should a *minor* confess himself to be an adulterer. I have also said [that there will be no relief] if he should have committed any of the acts which the same statute punishes as adultery, for example, if he married a woman knowing that she had been condemned for adultery or did not divorce a wife taken in adultery or made a profit from his wife's adultery or accepted money to conceal debauchery which he had discovered or provided a house where debauchery or adultery might take place. In relation to the provisions of statutes, youth does not furnish with an excuse one who infringes a law although he invokes it.

38 PAUL, *Decrees, book 1:* Aemilius Laurianus bought from Ovinius the Rutilian land under a *lex commissoria* and paid part of the price, the conditions being that if he did not pay half of the rest of the price within two months of the sale, the contract should be at an end, and likewise that if he had not paid the balance of the price within a further two months, the contract similarly would be at an end. Within the first period of two months, Laurianus died and was succeeded by Rutiliana, a *pupilla* whose tutors failed to make the payments due. The seller, having given frequent warnings to the tutors, after a year sold the same land to Claudius Telemachus. The *pupilla* sought *restitutio in integrum.* Having lost in the proceedings both before the praetor and the urban prefect, she appealed. I thought that the judgment was correct because the contract had been made by her father not by the *pupilla* herself. However, the emperor was swayed by the fact that the day on which the sale might be rescinded fell in the time of the *pupilla* (that is, after her father's death), and she had brought it about that the conditions of the sale were not observed. I said that a better reason for granting *restitutio* would be that the seller, by giving a warning after the day on which it had been agreed that the sale might be rescinded and by seeking the price, is held to have departed from his own condition. I also said that I was not concerned by the fact that the time had run out after the death of the father, any more than if a creditor had sold a pledge when the day for payment had passed after the death of the debtor. Nevertheless, because the *lex commissoria* displeased him, the emperor awarded *restitutio in integrum.* He was also influenced by the fact that the former tutors who had not sought *restitutio* had been declared suspect. 1. When it is said that sons-in-power do not generally receive help after emancipation, although still *minores*, with respect to matters which they had neglected while in power, this is correct in cases when the benefit can be acquired for their father.

39 SCAEVOLA, *Digest, book 2:* Within the appropriate period for *restitutio*, *minores* sought *restitutio in integrum* before the governor and submitted proof of their age. After the decision on the question of age had been given in their favor, their opponent, in order to prevent investigation by the governor, appealed to the emperor. The governor, pending the result of the appeal, adjourned the remainder of the investigation. The question is raised: If, when the hearing of the appeal before the emperor has been concluded and the appeal disallowed, they are discovered to have passed the age of minority, can they continue the prosecution of their suit [before the governor] since it was through no act of theirs that the business was not concluded? I replied that according to what had been set forth, the investigation might proceed just as if they were still *minores.* 1. On a sale of land of a *minor* by curators, the buyer was Lucius Titius who was in possession for about six years and made very considerable improvements. I ask: "Since the curators are solvent, can the *minor* have *restitutio in integrum* against the buyer Titius?" I replied that going by all that had been set forth, he can scarcely obtain *restitutio* unless he preferred to pay to the buyer all the expenses

which the latter has shown he has incurred in good faith, especially since help is readily available to him, his curators being solvent.

40 ULPIAN, *Opinions, book 5:* A judgment was given that money due under a *fideicommissum* be paid to someone under twenty-five. He had acknowledged receipt of the money, and the debtor [heir] gave him a *cautio* as though a loan had been made to him. The *minor* can obtain *restitutio* because by a new contract he had converted the claim arising on the ground of the judgment into a claim arising on a new ground. 1. Someone under twenty-five, without due care and consideration, gave land of his father in satisfaction of debts arising under the accounts of a tutelage for third persons which his father had administered. The matter is to be restored to its equitable position through *restitutio in integrum*, the interest on the money which should appear to be owed under the tutelage calculated and set off against the amount of fruits gathered.

41 JULIAN, *Digest, book 45:* If a young person has been overreached in connection with a sale and the judge has ordered that the land be restored and that he return the price to the buyer, and then he changes his mind and refuses to make use of his *restitutio in integrum*, he could have a *utilis exceptio* against the buyer, if the latter sues for the price on the basis that a judgment for it had been given; for anyone is allowed to disregard what has been introduced for his benefit. Nor could the buyer complain, should he have been restored to that situation which he had himself brought about and which he could not have changed if the *minor* had not sought the praetor's help.

42 ULPIAN, *Duties of Proconsul, book 2:* The governor of a province can provide a *minor* with *restitutio in integrum* even with respect to a decision of his own or that of his predecessor. For what adults gain through the bringing of an appeal is acquired by *minores* through the benefit accorded to youth.

43 MARCELLUS, *Duties of Governor, book 1:* On cause being shown, an examination is to be held about the age of a person who alleges that he is more than twenty-five, the question of *restitutio in integrum* and other questions as well.

44 ULPIAN, *Opinions, book 5:* Not every transaction entered into by someone under twenty-five is voidable but only those found on investigation to be of such a kind that a *minor*, either through being overreached by others or deceived by his own credulity, has lost what he had or neglected to acquire a possible advantage or placed himself under an obligation which he did not have to undertake.

45 CALLISTRATUS, *Monitory Edict, book 1:* Labeo writes that an unborn child who has lost property through usucapion by someone else is to have his right of action restored. 1. The emperor Titus Antoninus provided by rescript that a *minor* who alleged that his opponent had been acquitted in an action through the fraud or malice of his [the *minor*'s] tutor and wished to sue him again has leave to sue first the tutor.

46 PAUL, *Replies, book 2:* One who voluntarily defends a *minor* in an action and is condemned can be sued on the ground of the judgment; nor does the age of the person he defended avail him in seeking *restitutio*, since he could not refuse the ground of action constituted by the judgment. From this it appears that neither can the *minor* in whose name he has been condemned seek the help of *restitutio* against the decision.

47 SCAEVOLA, *Replies, book 1:* A tutor at the urging of the creditors sold in good faith property of his *pupillus*, although the mother warned the buyers against the transaction. I ask whether the *pupillus* can obtain *restitutio in integrum* since the property

has been sold at the urging of the creditors and no accusation of corruptness can properly be brought against the tutor. My reply was that there must be an investigation into the case and the question of *restitutio* considered and that should *restitutio* be just, help should not be refused on the ground that the tutor had committed no delict. 1. A curator of young people sold lands owned in common by himself and those of whom he had the care. I ask whether the sale is to be rescinded to the extent by which the land was owned in common on the part of the young people if the young people obtained *restitutio in integrum* by decree of the praetor. My reply was that it is rescinded to this extent unless the buyer wants to withdraw from the whole contract as he was not prepared to buy a part. Likewise, I ask whether the buyer is to receive the price together with interest from the *pupilli*, Seius, and Sempronius, or rather from the heir of the curator. My reply was that certainly the heirs of the curator are liable but that actions are to be given against Seius and Sempronius in respect of their shares of the land, at least if the money received on account of these shares fell into their hands.

48 PAUL, *Views, book 1:* A *minor* by obtaining *restitutio in integrum* with respect to that which he has guaranteed or mandated does not free the principal debtor. 1. A *minor* sold a female slave. Should the buyer have manumitted her, *restitutio in integrum* for this reason cannot be obtained, but the *minor* will have an action against the buyer to the extent of his interest. A woman under twenty-five is to be heard if, by a pact relating to the dowry, her position is made worse and she entered into the sort of pact which no one of adult age would ever have agreed, and therefore wishes to revoke it.

49 ULPIAN, *Edict, book 35:* If the property of a *pupillus* or young person has been sold and no statute forbids the sale, it is certainly valid, but still, if the *pupillus* or young person suffers a considerable loss, even if there has been no collusion, it is revoked by means of *restitutio in integrum.*

50 POMPONIUS, *Letters and Readings, book 9:* Junius Diophantus sends greetings to his friend Pomponius. Someone under twenty-five, with the intention of novating, intervened on behalf of a person who was liable under an action which had to be brought within a certain period of time, when ten days of the period still remained, and afterward obtained *restitutio in integrum.* Is the *restitutio* [of the action] which is given to the creditor against the first debtor for ten days or a more extended period? I have expressed the opinion that from the moment of *restitutio in integrum* as much time is to be offered as remained [of the original period]. I would like you to reply in writing what you think about that. He replied: "Without doubt, I think that what you thought about the action to be brought within a certain period of time with respect to which the *minor* intervened is correct. Therefore, the property which the first debtor gave as pledge also remains bound."

5

CHANGE OF CIVIL STATUS

1 GAIUS, *Provincial Edict, book 4:* Change of civil status is change of status.

2 ULPIAN, *Edict, book 12:* This edict relates to those changes of civil status which leave intact rights of citizenship. But if change of civil status happens by loss of citizenship or loss of freedom, the edict will not apply, nor is there any possibility of an action against the persons concerned. Certainly, an action is given against those into whose hands their goods have fallen. 1. The praetor says: "Where someone, of either sex, after entering into any transaction or contract is said to have incurred a change of civil status, I will grant an action against him or her, just as if this had not occurred." 2. Those who have incurred a change of civil status remain under a natural obligation with respect to matters which have arisen prior to such a change. But if the matter has arisen afterward, one ought to blame them for entering into a transaction, so far as the words of this edict are concerned. But at times if a contract is made with

them after change of civil status, an action is to be given. And in fact, if there has been *adrogatio*, there is no difficulty, for the person adrogated will be under an obligation in the same way as a son-in-power. 3. No one is released from liability for delict, although he has incurred a change of civil status. 4. Where someone has adrogated his debtor, the action against the latter is not restored after he becomes independent. 5. This action is without limitation of time and lies both against heirs and in favor of heirs.

3 PAUL, *Edict, book 11:* It is settled that children, who follow a parent who has been adrogated, incur a change of civil status since they are in another's power and have changed their family. 1. A son and other persons who are emancipated obviously incur a change of civil status, since no one can be emancipated without being fictitiously reduced to the state of a slave. But the position is otherwise where a slave is manumitted because, as a slave, he has no rights and therefore can experience no change of civil status.

4 MODESTINUS, *Encyclopaedia, book 1:* For now he begins to have status.

5 PAUL, *Edict, book 11:* Loss of citizenship involves change of civil status as in the case of interdict by fire and water. 1. Those who revolt incur change of civil status (moreover, those who leave the persons under whose command they are and enroll themselves in the number of the enemy are said to revolt, and again those whom the senate has pronounced to be enemies or who have been so declared by a statute), at least to the extent that they lose citizenship. 2. Now we must consider what is lost by change of civil status and, in the first place, by the particular kind of change which leaves citizenship intact, where it is agreed that an individual's public rights are not affected. For it is certain that he remains a magistrate or senator or judge.

6 ULPIAN, *Sabinus, book 51:* For other public offices do not come to an end since change of civil status destroys a man's private and family rights, not those pertaining to his citizenship.

7 PAUL, *Edict, book 11:* Also change of civil status does not destroy tutelages with the exception of those held by persons subject to another's power. Therefore, tutors appointed by will or under a statute or *senatus consultum* will still remain tutors. But statutory tutelages under the *Twelve Tables* are extinguished, just as statutory rights of inheritance arising from the same source, because they devolve on agnates who cease to be such when their family is changed. But, under recent statutes, both rights of inheritance and tutelages are generally developed in such a way that the persons entitled are described by their natural relationships. For example, *senatus consulta* provide that an inheritance passes as between mother and son. 1. Obligations arising from insults and actions founded on delicts go with the person. 2. If, after deprivation of freedom, a change of civil status has followed, no *restitutio* will lie against the slave because not even under praetorian jurisdiction is a slave under an obligation to the extent that an action lies against him. But a *utilis actio* is to be given against the master, as Julian writes, and, unless he provides a defense in relation to the whole claim, I am to be allowed an order putting me into possession of the goods which the slave had [when free]. 4. Likewise, when citizenship is lost, there is no equitable rule allowing *restitutio* against one who, having lost his property and left the city, goes into exile with nothing.

8 GAIUS, *Provincial Edict, book 4:* It is obvious that those obligations which are understood to hold good in natural law do not perish with change of civil status, because a rule of civil law cannot destroy natural rights. Therefore, the action concerning the dowry, because it is framed with reference to what is right and just, continues to exist even after change of civil status,

9 PAUL, *Edict, book 11:* so that an emancipated woman may bring an action at any subsequent time.

10 MODESTINUS, *Distinctions, book 8:* Where a legacy has been left of money to be paid annually or monthly or a dwelling is bequeathed, certainly, on the death of the legatee, the legacy ends; but it continues despite an intervening change of status, of course, because such a legacy is a matter of fact rather than law.

11 PAUL, *Sabinus, book 2:* There are three kinds of change of civil status: the greatest, the middle, and the least. For there are three things which we have: freedom, citizenship, and family. Therefore, when we lose all three, that is, freedom and citizenship and family, the change of civil status is the greatest. But when we lose citizenship and retain freedom, the change of status is the middle. When both freedom and citizenship are retained and only family is changed, it is plain that the change of civil status is the least.

6

THE GROUNDS ON WHICH THOSE OVER TWENTY-FIVE OBTAIN *RESTITUTIO IN INTEGRUM*

1 ULPIAN, *Edict, book 12:* Everyone admits that the ground of this edict is most just. For a remedy is provided for rights infringed at a time when an individual was serving the state or afflicted by adverse circumstances and equally relief is given against persons in this position in order that they might neither gain nor lose by what has happened. 1. However, these are the words of the edict: "If any of his property is alleged to have been lost through nonuse when through duress he was away or, without fraud or malice, was absent on state business or was in prison, a state of slavery, or the power of the enemy or such loss happened after any of these events; or anyone's rights of action is alleged to have been barred by lapse of time; likewise, if anyone has acquired ownership of something by use or has acquired anything which has been lost by nonuse or has been freed from liability to any action through lapse of time because in his absence he was not defended or he was in bonds or had not provided the means by which he might be sued or where he might not lawfully be summoned to court against his will and no one undertook his defense or where, after an appeal on that matter was taken to a magistrate or person exercising the powers of a magistrate, his right of action is alleged to have been lost without fraud or malice on the part of the person taking the appeal—in respect of these matters I shall grant *restitutio in integrum* and allow the action to be brought within a year from the first moment at which the person entitled has the power to bring it. Likewise, if there is any other ground which seems lawful to me, I shall give *restitutio in integrum* so far as is permitted by statutes, plebiscites, *senatus consulta,* edicts, and decrees of the emperors."

2 CALLISTRATUS, *Monitory Edict, book 2:* This edict so far as it relates to those mentioned in it is not frequently in use. For such persons have justice administered to them *extra ordinem* in accordance with *senatus consulta* and the constitutions of the emperor. 1. However, under this head, help is given in the first place to those who were absent on account of duress, provided, of course, that they were terrified and not kept away by a needless fear.

3 ULPIAN, *Edict, book 12:* Moreover, he is held to have been absent on account of duress who has been terrified and kept away by a just fear of death or torture; this is gathered from his emotional state. But it is not sufficient that he has been frightened and kept away by any sort of terror. This is a matter for investigation by the judge.

4 CALLUSTRATUS, *Monitory Edict, book 2:* Likewise, [the edict gives help to] those who were absent without fraud or malice on state business. I understand fraud or malice to have been present where a person failed to return, although he could have returned. Hence, he receives no help in relation to adverse acts in that period. For example, if he has contrived to be absent on state business to secure some other considerable profit, the privilege of receiving that help will be denied him.

5 ULPIAN, *Edict, book 12:* And [the same applies in the case of one] who has deliberately arranged to be absent even without profit or who has set out too soon or, on account of litigation, begins an absence on state business. But this addition of fraud or malice refers to those absent on state business, not also to one who is absent on account of duress, since there is no duress if fraud or malice is present. 1. But those who serve the state in Rome are not absent on state business,

6 PAUL, *Edict, book 12:* as magistrates.

7 ULPIAN, *Edict, book 12:* Certainly, soldiers who are stationed in Rome are held to be absent on state business.

8 PAUL, *Short Notes, book 3:* Also municipal envoys receive help in accordance with the constitution of the Emperors Marcus and Commodus.

9 CALLISTRATUS, *Monitory Edict, book 2:* Help is also given to one who was in bonds. This applies not only to a person kept in public confinement but also to one who has been forcibly overcome and kept in bonds by robbers or bandits or someone more powerful. Moreover, the word "bonds" is interpreted widely. For it is settled that even those who have been shut up, for example, in a stone quarry, are held to be bound, because it makes no difference whether a person is confined by walls or fetters. However, Labeo thinks that confinement is to be understood only in the sense of public confinement.

10 ULPIAN, *Edict, book 12:* In the same position are also those who are kept in custody by soldiers, the attendants of a magistrate, or servants of a municipality, if they are shown not to have been able to look after their own business. Moreover, we also understand to be in bonds those who are bound in such a way that they cannot without disgrace appear in public.

11 CALLISTRATUS, *Monitory Edict, book 2:* One who was in a state of slavery, whether he was a free man serving another in good faith as a slave or was held prisoner, also receives help.

12 ULPIAN, *Edict, book 12:* However, one who is litigating about his own status, out of which an action has commenced, does not fall within the scope of this edict. Therefore, he is held to be in a state of slavery only for as long as an action of this kind has not been commenced.

13 PAUL, *Edict, book 12:* Labeo rightly says that a person who has been instituted heir and declared free does not fall within the scope of the edict before he is heir because he has no property; and the praetor is speaking of freemen. 1. I think that even a son-in-power falls under this edict with respect to *peculium castrense.*

14 CALLISTRATUS, *Monitory Edict, book 2:* Likewise, help is given to one who was in the power of the enemy, that is, was captured by the enemy. For it is to be supposed that no advantage is granted to deserters who are refused *postliminium.* Yet those who were in the power of the enemy could fall within the scope of that part of the edict which speaks of those who were in a state of slavery.

15 ULPIAN, *Edict, book 12:* Moreover, where those captured by the enemy have returned with *postliminium,* help is given them, as it is available if they have died among the enemy. The reason is that they cannot have a procurator, since the other persons mentioned above can also be given help by means of a procurator, except those who are kept in a state of slavery. Moreover, I think that help is also available on

account of one who is in the power of the enemy, if a curator (as is generally the case) has been appointed to the control of his property. 1. It is held that help will be provided no less to one born among the enemy who has *postliminium* than to one captured by them. 2. If someone is sent into possession of a soldier's house on the ground of threatened damage, certainly if the praetor in the presence of the soldier orders possession to be given, no *restitutio* is to be granted, but, if in his absence, it is to be said that help ought to be afforded him. 3. But the simple statement of the praetor in the edict "or subsequently . . ." is to be interpreted in this way. If the occupation of the possessor in good faith has begun before [the owner's absence] but has finished on his return, help may be given by *restitutio*, not at any time but only if it is sought within a reasonable time of his return, that is, after he has hired a lodging, settled his baggage, and found an advocate. For Neratius writes that one who puts off seeking *restitutio* is not to be heard.

16 PAUL, *Edict, book 12:* For help is given not to the careless but to those necessarily hindered by events. And all this will be regulated by the judgment of the praetor, that is, in the result he affords *restitutio* to those who were unable to join issue in an action not through carelessness but through shortage of time.

17 ULPIAN, *Edict, book 12:* Julian, in his fourth book, writes that a soldier is to receive help not only against the possessor of an inheritance but also against purchasers from the possessor, so that the property can be vindicated, provided the soldier has accepted the inheritance. But, if he has not accepted, it is obvious that an inference may be made that usucapion has proceeded. 1. Labeo writes, and Julian, in his fourth book, and Pomponius, in his thirty-first book, agree that also a person to whom a legacy has been left in the form "for every year in which he was in Italy" is to receive *restitutio* to enable him to take as though he was in Italy. For this is not a case in which the time for bringing an action has passed, where the help of the praetor was necessary, but one which turns upon the presence of a condition.

18 PAUL, *Edict, book 12:* It is to be known that we grant to adults the help of *restitutio* only in those cases which they bring in order to recover property, not when they seek help in order to make a profit from a penalty or loss imposed on another.

19 PAPINIAN, *Questions, book 3:* Finally, if a buyer, before he has acquired by use, is captured by the enemy, it is decided that he does not by *postliminium* receive *restitutio* in respect of the interrupted possession because acquisition by use cannot occur without possession; but possession is very much a matter of fact; and in truth an issue based on fact is not included in *postliminium.*

20 PAPINIAN, *Questions, book 13:* Nor ought a *utilis actio* be granted to him; for it is most unfair to remove from the owner what use has not removed. For property is not understood to have been lost unless it has been removed from another.

21 ULPIAN, *Edict, book 12:* "Likewise," the praetor says, "if someone has acquired ownership of something by use or has acquired anything which has been lost by nonuse or has been freed from liability to any action through lapse of time because in his absence he was not defended." The praetor has inserted this clause in order that just as he helps the persons mentioned above to prevent their being taken at a disadvantage, so he may also give help against these very persons to prevent their taking advantage of others. 1. It should also be noted that the praetor's words are more comprehensive when he provides *restitutio* against those persons than when he helps them. For here he does not enumerate definite people against whom he offers help, as in the cases above, but adds a clause embracing all those who in their absence are not defended. 2. Moreover, such *restitutio* is applicable whether those who were absent and undefended have acquired by use, through themselves or through those persons subject to them, provided that there was no one to undertake their defense. For if

there was a procurator, since you had someone whom you may sue, he [the person who has acquired by use] ought not to be disturbed. But if there is no one to undertake the defense, the fairest course will be that help is given, all the more because the praetor in the edict promises *missio in possessionem* with respect to the property of those who are not defended, if indeed they lie concealed, in order that if required, it may even be sold; but if they do not lie concealed, although they are not defended, he promises only *missio in possessionem* with respect to their property. 3. Moreover, one is held not to be defended where someone comes forward and offers himself as defender, but only where a person is sought by the plaintiff and is not prepared to abandon the defense, and the defense will be held to be complete both if the hearing is not evaded and security for the payment of the judgment is given.

22 PAUL, *Edict, book 12:* Therefore, it must be known that this edict only applies if the friends of the person in question were asked whether they would undertake the defense or if there is no one who could be asked. For he is held not to be defended in his absence only if the plaintiff on his side starts proceedings and no one offers to defend. And he should make a record of these facts as evidence. 1. Therefore, just as the praetor is not willing that the persons in question suffer loss, so he does not allow them to make a profit. 2. Labeo says that this edict also relates to lunatics and *infantes* and cities.

23 ULPIAN, *Edict, book 12:* The praetor says: "or was in bonds or had not provided the means by which he might be sued." A person in this position is properly included; for it could happen that someone was present in bonds whether placed there by the state or by a private individual. For it is agreed that one who is in bonds, provided that he is not in a state of slavery, can acquire by use. Again, if one who is in bonds is defended, there is no *restitutio*. 1. Moreover, one who is in the hands of the enemy can acquire nothing for himself by means of use, nor can he complete a period of possession which he has begun as long as he is with the enemy. And there is this further point: When he has returned, he will not in virtue of *postliminium* acquire ownership through use. 2. Likewise, Papinian says that help is to be given to one who, through captivity, has lost possession of land or, as it were, possession of a usufruct; and also he thinks it fair that the captive ought to be given *restitutio* with respect to the fruits of the usufruct gathered in the meantime by another. 3. Certainly, those who were in the power of a person who has been captured can acquire property by use in virtue of their *peculium.* And it is fair that on the ground of this clause, those present, that is, those who are not in captivity, receive help if, through not being defended, any of their property should have been acquired by usucapion. Again, if the time for bringing an action lying against a captive has expired, help will be given to the person entitled against him. 4. Then the praetor adds: "or has not provided the means by which he might be sued," so that if, while the person in question was in the course of making provision, he has completed acquisition by use or one of the events mentioned above occurs, *restitutio* may be granted [against him]. This provision is proper; for it is not always sufficient to order *missio in possessionem* in respect of property, because at times a situation can occur in which one cannot receive *missio in possessionem* in respect of the property of a person who had hidden himself or even where he has not hidden himself. For example, suppose that while he is seeking legal advice or while the hearing is postponed for some other reason, the time for bringing the action has expired.

24 PAUL, *Edict, book 12:* Again, the edict applies to those who, when sued, use delaying tactics and by any sort of subterfuge and device contrive that they are unable to be sued.

25 GAIUS, *Provincial Edict, book 4:* Indeed, we say that this edict also applies in a similar way to one who acted in such a way not to procrastinate but because he was disturbed by a whole host of matters.

26 ULPIAN, *Edict, book 12:* Again, if the praetor was at fault, *restitutio* will be granted. 1. Pomponius says that, on the ground of the general clause, *restitutio* is to be given against one who has been banished but is not to be allowed to such a person himself because he could have left behind a procurator. Yet I think that on cause being shown, help is also to be given to him. 2. The praetor says: "or where he might not lawfully be summoned to court against his will and no one undertook his defense." This clause relates to those who, in ac-

cordance with ancestral custom, may not be summoned without harm to the summoner, for example, a consul, praetor, and others who have some authority or legal power. But this edict does not relate to those whom the praetor forbids to be summoned without his permission, since, on application, permission could have been given, for example, in relation to patrons and parents. 3. Then he adds: "And no one undertook his defense." This relates to all those mentioned above except to one who, in his absence, acquired something by usucapion, since full provision has been made above for this case. 4. The praetor says: "Or it is alleged that his right of action has been lost through the magistrates without fraud or malice on his part." What is the point of this? The point is to allow *restitutio* to be made where an action is lost through adjournments made by a judge. Again, if there was no magistrate available [to whom application might be made], Labeo says that *restitutio* is to be granted. Moreover, the words "through the magistrates" are to be understood as covering the case in which a magistrate has not given a hearing, whereas if, on cause being shown, he refuses an action, *restitutio* is not available. And so Servius holds. The position is the same if a magistrate is partial or corrupt and has not given a hearing. Not only will this clause of the edict be applicable but also the previous one "or had not provided the means by which he might be sued"; for in corrupting the judge, a party has contrived that no action is brought against him. 5. An action which has been lost will have to be understood as one which it is not possible to bring. 6. And there is added: "without fraud or malice on his part," the intention, of course, being that if there has been fraud or malice on his part, he will not receive help. For the praetor does not help persons who themselves have done wrong. Accordingly, if someone has procrastinated because he wishes to bring his case before the next praetor, he will not receive help. Again, if, so long as he did not obey the praetor's decree, the latter refused him a hearing, Labeo writes that he is not to receive *restitutio*. And the same applies if for any other lawful reason he was not heard by the praetor. 7. If special holidays are declared, for example, on account of some success or in honor of the emperor, and for this reason the magistrate has not heard the application, Gaius Cassius specifically provided in his edict that he would grant *restitutio* because this must be held to have happened through the praetor. Account of ordinary holidays ought not to be taken, because the plaintiff could and ought to have planned his application so that it would not fall on one of them. This is correct and so Celsus writes in the second book of his *Digest*. But when holidays cut into the time, *restitutio* is to be made only with respect to the days themselves not the whole time. And so Julian writes in the fourth book of his *Digest*; for he says that a usucapion is to be rescinded, to the extent that there is *restitutio*, with respect to those days on which the plaintiff wished to bring an action and was prevented through the intervention of holidays. 8. The same applies whenever by his absence someone hinders another for a period of time falling short of the whole, as where I possessed your object for one day less than the time established for usucapion and then commenced my absence on state business. *Restitutio* against me is to be made with respect to one day. 9. "Likewise," says the praetor, "if there is any other ground which seems lawful to me, I shall give *restitutio in integrum*." This clause is necessarily inserted in the edict. For many eventualities can occur which warrant the help of *restitutio*, and yet they cannot be enumerated individually, so that whenever equity suggests *restitutio*, resort will be had to this clause. For example, someone has acted on behalf of a city in an embassy. It is most fair that he receive *restitutio* although he is not absent on state business. And it has frequently been laid down that he ought to receive help whether he had a procurator or not. I think that the same applies even if someone is summoned to give evidence from any province, either in the city or before the emperor. For frequently rescripts have provided that a person in this position receives help. Again, help similarly is to be provided for those who have gone abroad for the sake of an inquiry or an appeal. And generally, whenever anyone necessarily and not voluntarily has been away, it ought to be said that he is to receive help.

27 PAUL, *Edict, book 12:* And whether he has lost anything or has not made a gain, *restitutio* is to be made, even if none of his property has been lost.

28 ULPIAN, *Edict, book 12:* Also, if someone was absent on an acceptable ground, the

praetor ought to consider whether he should receive help, for example, if he was away in order to study and his procurator happened to die. This is in order that he might not be deprived through absence for a very good reason of some expected advantage. 1. Likewise, if someone is neither in custody nor in bonds but has provided security by means of guarantors, he cannot withdraw because of this, and insofar as he has suffered loss, *restitutio* may be granted both to him and against him. 2. "So far," says the praetor, "as is permitted by statutes, plebiscites, *senatus consulta*, edicts, and decrees of the emperors." This clause does not promise that there will be *restitutio* if the laws permit, but if they do not forbid. 3. Where anyone was frequently away on state business, Labeo thinks that the time for *restitutio* is to run from his most recent return. But if all the absences together amount to a year, the individual absences to less than a year, it is to be seen whether we grant a year to him for *restitutio* or rather only the period of time taken up by his latest absence. And I think a year is to be given. 4. If, although you lived in a province, you were in the city, will the year begin to run on the ground that I had the power to bring the action? And Labeo says it will not. But I think this is correct if my opponent had the right to summon me to the place where he had his house, but if not, I am held to have the power of bringing an action because joinder of issue was also possible even at Rome. 5. In a case where an action for rescission is available, one who was absent on state business will also have a defense, as where a *vindicatio* is brought to recover property of which he had acquired possession [having previously lost it]. 6. In the case of an action for rescission lying against a soldier, Pomponius says that it is very fair that he is also liable for the profits relating to the period in which he was absent and undefended. Therefore, the soldier [in the converse case] also ought to have *restitutio* with respect to them. Both sides will have an action,

29 AFRICANUS, *Questions, book 7:* of course, the intention being that public service should neither confer a profit nor inflict a loss on anyone.

30 PAUL, *Edict, book 12:* When a soldier who was in the course of usucapting died and his heir completed usucapion, it is fair that the usucapion afterward completed be annulled, the result being that the same rule is to be observed in the case of heirs who have succeeded in the usucapion [as in the case of the deceased], because the possession of the deceased descends to the heir as though joined to the inheritance and generally usucapion is completed, although entry on the inheritance has not yet been made. 1. If anyone who was away on state business usucapted and, after usucapion, alienated the property, *restitutio* will have to be made; and although he was absent without fraud or malice and usucapted, there should be a remedy in respect of his profit. Likewise, *restitutio* will have to be made on all other grounds, for example, if judgment has been given against him.

31 PAUL, *Edict, book 53:* If someone whose property has been usucapted by one absent on state business has acquired possession of his property usucapted by the latter, although he afterward should lose it, his action is not limited in time but is perpetual.

32 MODESTINUS, *Rules, book 9:* Also one is understood to have been away on state business where he has departed from the city, although he has not yet reached the province. But once he has departed, [he is held to be absent] until he should return to the city. And this applies to proconsuls and those in charge of provinces or the imperial procurators who are on duty in the provinces, and military tribunes and prefects and the staff of envoys whose names have been given to the treasury or are recorded in the imperial register.

33 MODESTINUS, *Problems Solved, sole book:* Included among those who receive help under the general clause is also the *patronus* of the imperial treasury. 1. It is settled that those who record the acts of governors are not absent on state business.

2. Military doctors, since they exercise an office which both is of public benefit and ought not to expose them to liability, can seek the help of *restitutio.*

34 JAVOLENUS, *From Cassius, book 15:* If a soldier has accepted leave and is at his own home, he is not held to be absent on state business. 1. One who gives public service in relation to the farming out of revenues for collection is not absent on state business.

35 PAUL, *Lex Iulia et Papia, book 3:* Those who are sent to lead or to bring back soldiers or arrange recruiting are absent on state business. 1. The same applies to those who are sent to offer congratulations to the emperor, 2. and also to an imperial procurator, not only one entrusted with the affairs of any province but also one entrusted with some of its affairs, although not all. Therefore, several procurators in the one province but dealing with different matters are understood to be absent on state business. 3. Also the prefect of Egypt is absent on state business, or one who leaves the city for any other reason on behalf of the state. 4. Again, the deified Pius established the same for soldiers stationed in the city. 5. A question is raised whether one who is sent to curb evildoers was absent on state business, and it has been settled that he was. 6. The same applies in the case of a civilian who went on an expedition by order of a man of consular rank and there fell in battle. For help is given to his heir. 7. One who has set out for Rome on state business is held to be absent on such business. Again, if he set out from his own country on state business, he is absent on such business even if it is open to him to travel through the city. 8. Someone in a province is held to be in a position similar to that of an absent person as soon as he has set out from his home or, when remaining in the province to administer state affairs, as soon as he begins to conduct public business. 9. And a soldier, while proceeding to or returning from camp, is absent on state business, because one about to serve as a soldier has both to proceed to and return from camp. Vivianus writes that Proculus gave an opinion that a soldier who is absent on leave, while going home or returning, is absent on state business, but is not so absent while he is at home.

36 ULPIAN, *Lex Julia et Papia, book 6:* We understand people to be absent on state business only where they are compelled to be absent, not where they are absent for their own advantage.

37 PAUL, *Lex Julia et Papia, book 3:* Those who sit as assessors in their province beyond the time allowed by constitutions are not understood to be absent on public business.

38 ULPIAN, *Lex Julia et Papia, book 6:* If the emperor, by a special privilege, allows anyone to sit as assessor in his province, I think that he is absent on state business. But if anyone were to do this without permission, we say that the logical consequence is that since he has committed an offense, he does not have the privileges of those who are absent on state business. 1. A person will be held to be absent on state business for as long as he is in charge of a public office; but if he has left office, he immediately ceases to be absent on state business. But for his return we allow a period of time, beginning from the moment he ceased to be absent on state business, sufficient to enable him to return to the city. And it will not be excessive to allow him the period of time which statute allows governors for their return. Therefore, if he turns aside on business of his own, we do not doubt that that time does not avail him, and after the time in which he could have returned is calculated, we say that immediately on the expiry of that period he has ceased to be away on state business. Certainly, if he could not continue his journey because he was prevented by illness, account of this will be

taken on the ground of humanity, just as allowance is generally made in the case of storms, the hazards of navigation, and other difficulties which accidentally occur.

39 PAUL, *Views, book 1:* Where someone about to go away on state business left a procurator by whom he could be defended, he is not heard if he wishes *restitutio in integrum.*

40 ULPIAN, *Opinions, book 5:* If a soldier is competent to bring any accusation at a time when he was serving the state, his right is not extinguished. 1. Where someone banished to an island in consequence of a penalty imposed on him has sought *restitutio* in respect of this period and it was found that another had taken possession of goods which had not been confiscated, he must be put back to his former position with respect to them.

41 JULIAN, *Digest, book 35:* If someone gave a legacy to Titius on condition that he was in Italy at the time of the testator's death, or for every year that he was in Italy, and he received help because he was excluded from the legacy through absence on state business, he is compelled to honor a *fideicommissum* charged on him. MARCELLUS notes: For who doubts that where a soldier receives *restitutio* with respect to an inheritance which he lost through absence on state business, rights under legacies and *fideicommissa* will be safe?

42 ALFENUS, *Digest, book 5:* It is not correct to say that a person who has gone on an embassy for private affairs is absent on state business.

43 AFRICANUS, *Questions, book 7:* If someone has stipulated for each year, either he himself or the promisor should be in Italy, and one of them has gone away on state business, it is the duty of the praetor to give an *actio utilis.* We say the same even if the stipulation was framed in this form: "if he was in Rome for the next five years" or "if he was not in Rome, do you promise to give a hundred."

44 PAUL, *Sabinus, book 2:* Where someone absent on state business has suffered a loss, he will not receive *restitutio* if he would have suffered the loss even though he had not been absent on state business.

45 SCAEVOLA, *Rules, book 1:* All soldiers, who cannot without risk leave their standards, are understood to be absent on state business.

46 MARCIANUS, *Rules, book 2:* One who was absent on state business is to receive *restitutio* even against one who likewise was away on state business, if he justly complains of loss.

7

TRANSFERS MADE IN ORDER TO CHANGE THE CONDITION OF AN ACTION

1 GAIUS, *Provincial Edict, book 4:* The proconsul has employed every means to ensure that no one's legal condition should be made worse through another's act. And since he understood that at times the outcome of a trial was made more difficult for us if we had to face a different adversary, he also took this matter into account by providing that if anyone by transferring property substituted another in his place as our adversary and did this deliberately to our detriment, he will be liable to us by an *actio in factum* for as much as it is in our interest that we did not have a different adversary. 1. Therefore, if he has brought forward a man from another province or a man of greater influence and resources as our adversary, he will be liable,

2 ULPIAN, *Edict, book 13:* or anyone else who will be a vexatious adversary,

3 GAIUS, *Provincial Edict, book 4:* because, even if I bring an action against one who is from another province, I ought to bring the action in his province; and we cannot be in an equal position vis-à-vis a person of greater influence and resources. 1. Again, if

our adversary has manumitted a slave whom we are claiming, our legal condition is made worse because praetors favor grants of liberty. 2. Likewise, if you have transferred land in which you have carried out works in respect of which you are liable under the interdict against force or stealth or the action to ward off rain water, our legal condition is understood to have been made worse because, if an action was brought against you, you ought to remove the construction at your own expense but now, in suing someone other than the one who did the work, I am compelled to remove it at my expense because one who possesses what has been constructed by another is liable to those actions only to the extent that he allows the construction to be removed. 3. Also if I have given you notice that your proposed construction endangers my property and you have transferred the land and the buyer has carried out the work, it is said that you are liable in this action on the ground that I can sue neither you on the notice, because you have done nothing, nor the person to whom you have transferred, because no notice was given to him. 4. From this it is apparent that with respect to the proconsul's promise to grant *restitutio in integrum*, the plaintiff in the action before the judge obtains the amount by which it is in his interest that he did not have a different adversary. He may, for example, have incurred extra expenses or suffered some other loss through the substitution of a different adversary. 5. Therefore, what is the position if one against whom such an action lies is prepared to submit to an *actio utilis*, just as if he still possessed? It is rightly said that the action arising from this edict is not to be granted against him.

4 ULPIAN, *Edict, book 13:* Likewise, if property was usucapted by one to whom it was transferred and cannot be claimed from him, this edict is applicable. 1. And equally it can happen that one certainly ceases to possess without fraud or malice but does so in order to change the conditions of the action. And there are several other such cases. Further, someone can through fraud or malice cease to possess and yet has not done so in order to change the conditions of the action and is not liable under this edict. For one who merely loses possession does not transfer. Yet the praetor does not disapprove of the act of one who greatly desired to be without the property in order to avoid excessive litigation on account of it (for this modest resolve on the part of one who curses law suits is not to be blamed), but only of the act of one who, wishing to have the property, transfers the suit to another so that he substitutes a troublesome adversary for himself. 2. Pedius, in his ninth book, says that this edict relates not only to the transfer of ownership but also to that of possession. Otherwise, he says, one against whom an action *in rem* is brought will not be liable if he has ceased to be in possession. 3. But if anyone, on account of ill-health or age or necessary business, has transferred an action to another, the ground of his act exempts him from liability under this edict since in it mention is made of fraud or malice. Otherwise, a person would have been forbidden even to conduct litigation by means of procurators, since ownership is generally transferred to them on a lawful ground. 4. This edict relates even to rights in respect of land, provided that the transfer has been made with a fraudulent or malicious intent. 5. This action lies to the extent of the plaintiff's interest. Accordingly, if the property did not belong to the plaintiff or if a slave who was transferred died without fault on the part of the transferor, the action is not available unless there is anything further in the interest of the plaintiff. 6. This action is not penal but provides for recovery of the property at the discretion of the judge, and therefore it will also be given to the heir. But against the heir,

5 PAUL, *Edict, book 11:* or similar person,

6 ULPIAN, *Edict, book 13:* or after a year, it will not be given,

7 GAIUS, *Provincial Edict, book 4:* because, although it relates certainly to recovery of property, it is held to be given on the ground of delict.

8 PAUL, *Edict, book 12:* Also one who produces property is liable under this edict if, on the sentence of the judge, he has not restored the original conditions of the action. 1. The praetor says: "or any transfer made in order to change the conditions of an action," that is, if the conditions are of a future action not of one which has already

been brought. 2. One who has sold another's property is also understood to transfer. 3. But if anyone transfers by instituting someone as heir or making a legacy, this edict will not be applicable. 4. If anyone has transferred property and then received it back again, he will not be liable under this edict. 5. One who returns what he has bought to his seller is not held to have transferred in order to change the conditions of the action,

9 PAUL, *Curule Aediles' Edict, book 1:* because, where a slave has been returned, the position reverts to its original state, and, therefore, one who makes redhibition is not held to transfer in order to change the conditions of an action unless he makes redhibition for this very purpose and would not otherwise have given him back.

10 ULPIAN, *Edict, book 12:* Certainly, if I am under an obligation to one person and pay to him what you wish to claim from me, this edict will not apply. 1. If a tutor of a *pupillus* or an agnate of a lunatic has transferred property, a *utilis actio* lies because they are not able to make a fraudulent plan.

11 ULPIAN, *Opinions, book 5:* When a soldier makes a request to litigate in his own name about lands which, he said, had been given to him, the reply was that if the gift had been made in order to change the conditions of the action, the previous owner ought to sue so that he may be supposed to have transferred to the soldier the property rather than just a right to sue.

12 MARCIAN, *Institutes, book 14:* If anyone has transferred property in order to avoid the action for dividing common property, in accordance with the *lex Licinnia*, he is forbidden to bring the action for dividing common property. His intention might, for example, be that a buyer with greater resources should bid for and acquire it cheaply so that in this way he might get it back again. But where he has himself transferred part, he himself certainly will not be heard if he wishes to bring the action for dividing common property. But if the buyer wishes to sue, he is forbidden in accordance with that part of the edict which provides that no transfer may be made in order to change the conditions of the action.

8

MATTERS REFERRED TO ARBITRATION AND THOSE WHO HAVE UNDERTAKEN TO ARBITRATE IN ORDER TO MAKE AN AWARD

1 PAUL, *Edict, book 2:* Arbitration resembles an action at law and is intended to end litigation.

2 ULPIAN, *Edict, book 4:* It is settled that no defense arises from arbitration but there is a claim for a penalty.

3 ULPIAN, *Edict, book 13:* Labeo says that if a matter has been referred to arbitration and an award has been made under which someone is to be freed from liability incurred through a tutelage by a person under twenty-five, such an award is not to be held valid by the praetor; nor will a claim for a penalty incurred on that account be allowed. 1. Even though the praetor compels no one to undertake an arbitration, since the matter is free and without restriction and there is no necessity to exercise jurisdiction, yet when once anyone has undertaken an arbitration, the praetor considers that the matter now attracts his care and anxiety. This is so not merely because the praetor is anxious that there should be an end to litigation but because those who have selected someone to mediate between themselves on the basis of being a good *arbiter* ought not to be disappointed. For suppose that after a case has been considered more than once, the most intimate matters on both sides disclosed and the secrets of the affair revealed, the *arbiter*, whether through bias or because he has been corrupted or for any other reason, refuses to give an award, can anyone deny the extreme justice of the praetor's intervention to ensure fulfillment of the duty undertaken by the *arbiter*? 2. The praetor says: "Who has undertaken to arbitrate after a matter

has been submitted to arbitration and money has been promised." 3. Let us consider the person and position of *arbitri.* And, indeed, the praetor compels an *arbiter* of any rank to carry out the duty which he has undertaken, even if he is of consular rank, unless he happens to have been placed in some magistracy or position of authority, that of consul perhaps or praetor, since he does not have authority in relation to them.

4 PAUL, *Edict, book 13:* For magistrates possessing higher or equal authority can in no way be compelled [by the praetor]. Nor does it matter whether they had undertaken to arbitrate before they became a magistrate or in the course of the magistracy itself. Those of lower rank can be compelled.

5 ULPIAN, *Edict, book 13:* Again, a son-in-power may be compelled.

6 GAIUS, *Provincial Edict, book 5:* Moreover, it is said that a son-in-power can be *arbiter* with respect to an affair of his father. For it is held by many that he can be a judge.

7 ULPIAN, *Edict, book 13:* Pedius in his ninth book and Pomponius in his thirty-third book write that it is of little importance whether an *arbiter* is free born or a freedman, whether he is of good or infamous repute. Labeo writes in his eleventh book that a slave cannot undertake to arbitrate, and this is correct. 1. Hence, Julian says, if an arbitration is referred to Titius and a slave, Titius may not be compelled to give an award because he has undertaken to act with another; although, he says, the award made by the slave is void. Yet what is the position should Titius make an award? No penalty is incurred [by the parties] because he has not made an award on the terms he had undertaken.

8 PAUL, *Edict, book 13:* But if the reference was made upon terms, for example, that the opinion of either is valid, Titius may be compelled.

9 ULPIAN, *Edict, book 13:* But if an arbitration was referred to a slave and he gave his award when free, I think that if, having become free, he acted with the consent of the parties, his award is valid. 1. But an arbitration may not be referred to a *pupillus* or a lunatic or a deaf person or a mute, as Pomponius writes in his thirty-third book. 2. If anyone is a judge he is prohibited by the *lex Julia* from undertaking to arbitrate in the same matter in which he is judge or from ordering that the matter be referred to him as *arbiter.* And if he should make an award, recovery of the penalty is not to be allowed. 3. There are also others who are not compelled to make an award, for example, a corrupt *arbiter* or one whose behavior is obviously scandalous. 4. Julian says that if the parties have attacked a possible reputation of an *arbiter,* the praetor ought not in all circumstances to excuse him from acting but only on cause being shown. 5. The same writer says that if the parties after rejecting the authority of the *arbiter* and resorting to the court,

10 PAUL, *Edict, book 13:* or another *arbiter,*

11 ULPIAN, *Edict, book 13:* then returned to the original *arbiter,* the praetor ought not to compel him to arbitrate between persons who have insulted him by spurning him and going to another. 1. Moreover, an *arbiter* is not to be compelled to make an award unless there has been a proper submission. 2. We ought to understand the praetor's statement "submission to arbitration and the promise to pay money" as referring not only to a situation in which a financial penalty is promised on both sides but also to one in which something else is promised instead of a penalty, should anyone not abide by the award of the *arbiter,* and so Pomponius writes. Therefore, what is the position if property has been deposited with the *arbiter* upon the understanding that he should deliver it to the successful party or, where one party refused to obey the award, that he should deliver it to the other? Is he to be compelled to make an award? I think that he is to be compelled. And the position is just the same if a certain quantity of goods has been deposited with him on the same understanding. Accordingly, if

one of the parties promised by stipulation property, the other money, there is a completed submission, and the *arbiter* is compelled to make an award. 3. At times, as Pomponius writes, reference to arbitration is properly made by a bare pact, for example, where there were two persons indebted to each other and they made a pact that the one who did not obey the award of the *arbiter* would not seek what was owed to him. 4. Likewise, Iulian writes that an *arbiter* is not to be compelled to make an award, if one of the parties has promised but the other has not. 5. He says that the same applies even if the reference to arbitration provides for a penalty under a condition, for example, so many thousands if a ship should arrive from Asia. For the *arbiter* is not to be compelled to make an award before the condition has been fulfilled, lest it should be deprived of effect should the condition fail. And so Pomponius writes in his thirty-third book *On the Edict.*

12 PAUL, *Edict, book 13:* In this case, the only matter which might perhaps be the concern of the praetor is that if it was possible for the time allowed in the terms of reference to be extended, he might authorize an extension.

13 ULPIAN, *Edict, book 13:* Pomponius says that if one of the parties has been formally released from the penalty provided in the terms of reference, the *arbiter* ought not to be compelled to make an award. 1. Pomponius also writes that if my disputes alone have been referred to arbitration and I have stipulated for a penalty from you, it must be seen whether there has been a valid reference to arbitration. But I do not see what his difficulty is. For the reason that there has been a reference with respect to the affairs of one alone is no reason at all, since it is permissible to refer to arbitration even one matter. But if the reason is that only one party has stipulated, there is a point. To be sure, if it was the claimant who stipulated, it can be said that the reference is complete, because the other party is protected, for example, by the defense of pact and the claimant, in the event that the *arbiter*'s award is not obeyed, has the stipulation. But I do not think this to be correct. For the availability of a defense is not a sufficient reason for compelling the *arbiter* to make an award. 2. Moreover, as Pedius says, in his ninth book, a person is held to have undertaken to arbitrate where he has accepted the role of judge and promises that he will end the dispute by his decision. But if he has intervened in an attempt to see whether the parties are ready to end the dispute by his advice or authority, he is not held to have undertaken to arbitrate. 3. An *arbiter* to whom a dispute has been referred is not compelled to make an award on a day on which a judge is not compelled to deliver judgment, unless the time provided in the terms of reference is about to expire and cannot be extended. 4. Accordingly, if he should happen to be pressed by the praetor to make his award, it will be most just, if he swears that he is not yet clear about the case, that an interval be allowed him for the making of his award.

14 POMPONIUS, *Quintus Mucius, book 11:* But if a reference to arbitration has been concluded without limitation of time, it is necessary in all circumstances for the *arbiter* to establish a time, of course, with the consent of the parties, and that the case so be decided. But if this is not done, he may be compelled to make his award at any time.

15 ULPIAN, *Edict, book 13:* Moreover, although the praetor states without reservation in the edict that he will compel an *arbiter* to make his award, yet he ought at times to take account of his position and entertain an excuse on cause being shown, as, for example, where his reputation has been attacked by the parties or if a mortal enmity arises between him and the parties or one of them or if age or subsequent illness releases him from his duty or concern with his own affairs or an urgent journey or some service on behalf of the state. And so Labeo writes.

16 PAUL, *Edict, book 13:* And if any other misfortune befalls him after he has undertaken the arbitration [he is also released]. But in the case of illness or in similar cases, on cause being shown, he is compelled to postpone the award. 1. When a dispute is referred to an *arbiter*, he ought to be excused from acting if he is involved in a public or private action of his own, at least if the time provided in the terms of reference cannot be extended. But, if it can, why does not the praetor compel him to extend it

when he could? This is at times possible without exposing the *arbiter* himself to any extra trouble. Yet if each party wishes him to make an award, although there has been no undertaking about an extension of time, is the *arbiter* to succeed in his request that he should not be compelled to give an award because of involvement in an action of his own only if he consents to the matter again being referred to him for arbitration? Of course, this applies if the time is about to expire.

17 ULPIAN, *Edict, book 13:* Likewise, if one of the parties has become insolvent and surrendered his property to his debtors, Julian, in the fourth book of his *Digest*, writes that the *arbiter* may not be compelled to make an award since the insolvent party can neither sue nor be sued. 1. If a long time afterward the parties come back to the *arbiter*, Labeo says that he may not be compelled to make an award. 2. Likewise, if several persons have undertaken to arbitrate, no one of them will be compellable to make an award, but either all or none. 3. Hence, Pomponius in his thirty-third book asks: "If the terms of the reference to arbitration are that Seius should declare as his award, what is determined by the arbitrator Titius, who is to be compelled?" And I think such an arbitration to be not valid where the *arbiter* does not have an unfettered power of decision. 4. But if the terms of reference are such that the matter be determined in accordance with the arbitration of Titius or Seius, Pomponius writes, and we think, that the reference is valid. But the one on whom the parties have agreed will be compelled to make an award. 5. If an arbitration was referred to two persons upon terms that if they disagreed, they should bring in a third, I think that such a reference is not valid, because they could disagree on the person brought in. But if the terms were that Sempronius might be brought in as a third by them, the reference is valid, since they cannot disagree about the person to be brought in. 6. Yet, in the first instance, let us take the question, if an arbitration has been referred to two persons, ought the praetor to compel them to make an award because, considering how prone by nature men are to disagree, the matter is never likely to come to an end? For where an arbitration is referred to an unequal number of persons, the reference is valid not because all will easily agree but because, although they disagree, a majority is found whose opinion will stand. But it is common for an arbitration also to be referred to two persons and the praetor ought to compel the *arbitri*, if they do not agree, to select a particular third person whose authority may be obeyed. 7. Celsus, in the second book of his *Digest*, writes that if an arbitration is referred to three persons, it is certainly sufficient that two agree, provided the third had also been present. However, if he was absent, although two agree, the decision is not valid, because the arbitration was referred to several persons and, if present, he could have brought them over to his opinion,

18 POMPONIUS, *Letters and Readings, book 17:* just as where three judges have been appointed, the judgment of two who have agreed, in the absence of the third, is not valid because the majority opinion is valid only where it is apparent that all have pronounced judgment.

19 PAUL, *Edict, book 13:* Moreover, Labeo says that it is not the business of the praetor what sort of award an *arbiter* makes, provided that he states what he himself holds. And so, he says, if a dispute is referred to an *arbiter* upon terms that he deliver a certain opinion, the arbitration is void, and Julian writes in the fourth book of his *Digest* that he may not be compelled to make an award. 1. Further, we consider that an *arbiter* makes an award when he pronounces it with the intention that the parties settle the whole dispute in accordance with it. But if he has undertaken to arbitrate in respect of several matters, unless he ends all the disputes, an award is not held to have been made, and he will have to be compelled by the praetor to make one. 2. Accordingly, it will have to be seen whether he can change his opinion. And elsewhere the following point has been discussed. If an *arbiter* orders something to be given and

then soon afterward forbids it, ought what he ordered or what he forbade to stand? And Sabinus certainly thought he could do both. Cassius provides a good justification of his master's opinion and says that Sabinus was not thinking of an opinion which concluded the arbitration but of the preliminaries of the case, as, for example, where the *arbiter* orders the parties to be present on the first of the month and then changes the order to the thirteenth or fifteenth. For he can change the day. But once he has given an award in favor of the plaintiff or the defendant, as he ceases to be *arbiter*, he cannot change his opinion,

20 GAIUS, *Provincial Edict, book 5:* because an *arbiter*, although he has made a mistake in making his award, cannot correct it.

21 ULPIAN, *Edict book 13:* Yet if he has taken for consideration several disputes with nothing in common and has made an award with reference to one and not yet about the others, has he ceased to be *arbiter*? Therefore, let us see whether he can change the award he has already given for the first dispute. What is of particular relevance is whether the terms of the reference to arbitration provided that he make an award for all cases together or not. In the former case, he could change (for he has not yet made his award), but if he was to make an award for each individual case, the position is as though there are several distinct arbitrations, and therefore he ceases to be *arbiter* with respect to the matters relating to the dispute in question. 1. If the *arbiter* has made an award in the form that Titius appears to owe nothing to Seius, then, although he has not forbidden Seius to sue, yet if Seius does sue for something, he is held to have acted against the award of the *arbiter*; and Ofilius and Trebatius gave this opinion. 2. I think that an *arbiter* can establish the day for payment, and such also seems to be the opinion of Trebatius. 3. Pomponius says that an indefinite award made by an *arbiter* is ineffective as, for example, "pay how much you owe" or "your distribution is to be adopted" or "accept [as to your own claim] in proportion to what you have paid your creditors." 4. Likewise, if an *arbiter* forbade the recovery of the penalty arising from the reference to arbitration, I find it written in the thirty-third book of Pomponius that the order is not valid. And there is good reason in this because the penalty has not been referred to arbitration. 5. Papinian says in the third book of his *Questions* that where the time provided in the terms of reference has expired, the parties have agreed on an extension, have made a fresh reference to arbitration and the *arbiter* has not undertaken to arbitrate in the second arbitration, he is not to be compelled to undertake to arbitrate if he had not been in default and so failed to carry out his function; but if he had been at fault, it is fair that he be compelled by the praetor to undertake to arbitrate in the subsequent case. The question is settled in this way if there was no provision in the terms of the first arbitration for extension of the time; but if there was provision and he himself extended the time, he remains *arbiter*. 6. A reference to arbitration is called "full" when it covers "matters or disputes"; for it relates to all disputes. But should there be a dispute about one matter, although the reference is drawn up in the form of a full reference, the actions arising from the other grounds still remain. For the subject matter of the reference to arbitration is only that which is intended. But the safer course, if someone wants an arbitration on a particular matter, is to mention that alone in the terms of reference. 7. Further, the parties ought not to obey if the *arbiter* orders them to do something dishonorable. 8. If the parties appear before the *arbiter* within the time provided in the terms of reference and he orders them to appear after that time, the penalty is not incurred. 9. If one of the parties failed to appear because he was ill or prevented by absence on state business or by duties as a magistrate or for any other lawful reason, Proculus and Atilicinus say that the penalty is incurred; but that if he is prepared to refer a fresh arbitration to the same *arbiter*, an action will be refused or he will be protected by means of a defense. But this will be the case only if the *arbiter* was prepared to undertake the arbitration. For Julian, in the fourth book of his *Digest*, correctly writes that he is not to be compelled against his will. But the party himself is

nonetheless freed from liability to the penalty. 10. If an *arbiter* orders the parties to appear, for example, in a province, although the reference to arbitration had been made at Rome, the question is asked whether he may be disobeyed with impunity? And what Julian says in his fourth book is correct, namely that the terms of reference provide for the place which the parties intended to promise. Therefore, he will be disobeyed with impunity, if he orders them to appear at some other place. What is the position if it does not appear what place has been intended? The better opinion is that the parties appear at the place where the reference to arbitration was made. Yet what if he has ordered them to appear in a place outside the city? Pegasus allows the order to be valid. I think that this is correct if the *arbiter* is of such standing that he generally transacts his business in remote places and the parties can easily reach the place. 11. But if he ordered them to appear in some disreputable place, for example, an eating house or a brothel, without doubt, as Vivianus says, he will be disobeyed with impunity. And Celsus, in the second book of his *Digest*, approves this opinion. He goes on to consider this nice point: If the place is one to which one of the parties could not honorably come but the other could, and the one who could come there without dishonor fails to come, and the one for whom it was a dishonor to come has come, is the penalty provided in the terms of reference incurred on the ground that the act promised has not been performed? And Celsus correctly thinks that the penalty is not incurred; for it is absurd, he says, that the order in the case of the one is valid, not in that of the other. 12. Further, where the award of the *arbiter* has not been obeyed, it must be considered what period of time is to be allowed before the stipulation is infringed. And certainly, if no specific time has been provided, Celsus writes in the second book of his *Digest* that there be some reasonable period. When this has passed, the penalty can immediately be sought; and yet, he says, if the party in default gave what was due before joinder of issue, no action on the stipulation can succeed,

22 PAUL, *Edict, book 13:* at least unless it was in the other party's interest that payment should have been made immediately.

23 ULPIAN, *Edict, book 13:* Celsus says that if an *arbiter* ordered something to be given before the first of September, and it has not been given although it is afterward offered, still the penalty provided in the terms of reference, once incurred, does not disappear, since it remains true that it was not given before the first of the month. However, if the party entitled accepts what is offered, he cannot seek the penalty but is to be barred by the defense of fraud. The position is different if the party was ordered only to give [without mention of time]. 1. The same jurist says that if the *arbiter* ordered me to give something to you and you are prevented by illness or some other lawful reason from receiving, Proculus thinks the penalty is not incurred even where you are prepared to receive after the first of the month, but I do not give. But he himself rightly thinks that there are two instructions issued by the *arbiter*, one that the money be paid, the other that it be paid by the first of the month. Therefore, although you do not incur the penalty on the ground of not paying by the first since this was not your fault, yet you incur the penalty in respect of the other instruction, that is, because you do not pay at all. 2. The same jurist says that to observe the terms of the award can mean nothing other than to do all that is in one's power to obey the decision of the *arbiter*. 3. Celsus also says that if an *arbiter* ordered me to pay you money on a certain day and you refused to accept, it can be argued that in strict law the penalty is not incurred,

24 PAUL, *Edict, book 13:* but should that person be prepared to accept later, he says, I cannot with impunity refuse to pay, as I have not previously paid.

25 ULPIAN, *Edict, book 13:* Labeo says that where an *arbiter*, although it was provided in the terms of reference that he make his award on all matters on the same day and that he could extend the time, after making an award on certain matters, extended the time for the making of an award on the others, the extension of time for the award is valid and he can be disobeyed with impunity. And Pomponius approves the opinion of Labeo which also seems right to me, because in making the award the *arbiter* has not discharged his duty. 1. However, the clause "to extend the time for arbitration" gives no power to the *arbiter* other

than that of postponing the day for decision. And, therefore, he can neither narrow nor change the scope of the original terms of reference, and so he ought also to consider the other matters and make an award to take account of everything. 2. If, in the first reference to arbitration, an undertaking was provided by means of a guarantor, Labeo says that the same condition applies to a subsequent arbitration held after an extension of time. But Pomponius doubts whether it is necessary to have the same guarantors or others equally solvent. For what, he says, if the original guarantors were unwilling to act again? But I think that if they were not willing to act, then others not dissimilar are to be used,

26 PAUL, *Edict, book 13:* lest it be in the power of the guarantors, through subsequently refusing to renew their obligation, to ensure that the penalty be incurred. And the same applies even if they have died.

27 ULPIAN, *Edict, book 13:* The *arbiter* can extend the time either in person or through a messenger or letter. 1. If there has been no mention of the heir or other successors in the terms of reference, the arbitration is ended by the death of a party. Nor do we follow the opinion of Labeo who thought that if the *arbiter* ordered someone to pay money and he died before paying, the penalty is incurred although the heir was prepared to offer it. 2. Moreover, the award which the *arbiter* makes in a particular case ought to stand whether it is just or unjust; the person who referred the arbitration to him has himself to blame. For a rescript of the deified Pius adds: "Or you ought to bear with an undisturbed mind an unjustifiable opinion." 3. If there were several *arbitri* and they made different awards, these will not be allowed to stand. But, if the majority agree, their opinion will stand and, if it is not obeyed, the penalty is incurred. Hence, Julian raises the question: If one of three *arbitri* condemns for fifteen, the second for ten, and the third for five, which opinion stands? And Julian writes that five ought to be paid because all have agreed on this amount. 4. If any of the parties was absent, the penalty is incurred because it was through his act that the arbitration did not take place. Accordingly, an award, certainly made but not in the presence of the parties, is not valid unless it was specifically stated in the terms of reference that the award be made in the absence of either one or both. Moreover, the one who was absent incurs the penalty because it was through his act that the arbitration did not take place. 5. Moreover, an award is held to be made in the presence of the parties when they are capable of understanding it. But an award is not held to have been made in the presence of a lunatic or mentally incapacitated person. Likewise, an award is not held to have been made in the presence of a *pupillus* unless his tutor was present. And Julian writes to this effect about all these matters in the fourth book of his *Digest.* 6. And if any of those present prevents the *arbiter* from making his award, the penalty is incurred. 7. However, if there was no provision for a penalty in the reference to arbitration but merely a promise to abide by the award the action against a party who disobeyed, it would be for unliquidated damages.

28 PAUL, *Edict, book 13:* Further, it makes no difference whether the amount established as penalty in the terms of reference is certain or uncertain as, for example, "how much that affair will come to."

29 ULPIAN, *Edict, book 13:* A party acts against the award of the *arbiter,* if he sues one whom the *arbiter* has forbidden to be sued. Therefore, what is the position if he sues a guarantor? Is the penalty incurred? And I think that it is incurred, and so Sabinus writes; for in effect, he sues the principal debtor. But if I have made an arrangement with the guarantor to refer the matter to arbitration and sue the principal debtor, the penalty is not incurred unless it is to the interest of the guarantor that I do not sue.

30 PAUL, *Edict, book 13:* If anyone makes the subject of an action a matter which has been referred to arbitration, some say that the praetor does not intervene to compel the *arbiter* to make an award because now there can be no penalty, just as if the

reference to arbitration has been discharged. But if this were the position, it would be in the power of a party who regretted the reference to arbitration to frustrate it. Therefore, he must be held to have incurred the penalty which may be recovered by an action before the judge in the normal way.

31 ULPIAN, *Edict, book 13:* Moreover, the stipulation is infringed only where the act which contravenes it is done without fraud or malice on the part of the promisee. For infringement of the stipulation is governed by this condition to prevent anyone deriving a profit from his fraud or malice. But certainly, if the reference to arbitration contains a clause providing "that if an act has been committed with fraudulent or malicious intent in that matter," the person who has acted fraudulently or maliciously can be sued on the stipulation. And, therefore, if anyone bribes an *arbiter* either with money or with favors or the advocate of another party or any of those to whom he had entrusted his case, he can be sued on the clause relating to fraud or malice, or if he has cunningly overreached his opponent, and, in sum, if in this dispute he has behaved with fraudulent or malicious intent, the action on stipulation will lie. And therefore if his opponent wishes to bring the action for fraud, it ought not to be given since he has the action on stipulation. But if a clause of this kind has not been included in the terms of reference, then either the action for, or the defense of, fraud will be applicable. Moreover, this is a full reference to arbitration in that it incorporates a clause relating to fraud or malice.

32 PAUL, *Edict, book 13:* In the case of a reference to arbitration, we attach no importance to whether the penalty is less or more than the property which is the subject of the dispute. 1. The *arbiter* is not compelled to make an award if the penalty has been incurred. 2. If a woman on behalf of another makes a reference to arbitration, the penalty provided in the terms of reference cannot be exacted because of the intervention. 3. The essence of the matter is that the praetor does not intervene either where the reference to arbitration is void from the beginning or where it is valid but it is uncertain whether the penalty arising from it can be demanded or where subsequently the penalty cannot be incurred because the contract of arbitration has been discharged by lapse of time, death, formal release, judgment, or pact. 4. Let us see whether an *arbiter* to whom a priesthood happens to fall is compelled to make an award. For a concession should be made not only to the honor attained by the individual but also to the majesty of the god for whose rites the priests ought to be free. However, if he undertook the priesthood afterward, he ought, in all circumstances, to make an award. 5. Likewise, he is not to be compelled if there has been a *transactio* about the affair, or the slave with respect to whom the reference to arbitration was made has died, unless in the last case the parties have an interest in continuing with the arbitration. 6. Julian, without further specification, writes: If through a mistake the question of a delict involving *infamia* has gone to an *arbiter* or a matter for which a public action has been constituted, for example, adultery, murder, and the like, the praetor ought to forbid him to make an award and see that any award made is not enforced. 7. Where a reference to arbitration has been made in a matter relating to someone's freedom, the *arbiter* rightly is not compelled to make an award, because the presumption in favor of freedom is such that the question ought to go before a superior court. The same is to be said whether the issue is one of freedom by birth or freedom by manumission or where freedom is alleged to be due on the ground of a *fideicommissum.* The same is to be said in the case of an action which anyone might bring. 8. If a slave has referred a matter to arbitration, Octavenus thinks that the *arbiter* is not to be compelled to make an award, and if he should make it, exaction of the penalty is not to be allowed out of his *peculium.* But let us see whether, if a free man has made the reference with him, exaction is allowed against the free man? But the better opinion is that it is not allowed. 9. Likewise, if anyone has referred a matter to arbitration at Rome and then comes to Rome on an embassy, the *arbiter* is not to be compelled to make an award any more than the party is compelled, if issue in an action had

been previously joined, to carry on with it later. Nor does it matter whether he was originally also on the embassy or not. But if he refers the matter to arbitration while on the embassy, I think that the *arbiter* is to be compelled to make his award, because, if he had joined issue in an action of his own accord, he would also be compelled to carry on with it. Yet there are those who wrongly doubt this. At least, they will have no doubt as to the position obtaining if, when on the embassy, he refers to arbitration a transaction concluded while he was on the embassy because in a like case he is compelled to undertake an action at law. In relation to the first state of affairs, the question can be considered whether, if the envoy has previously made a reference to arbitration, the *arbiter* is to be compelled to make an award should the envoy himself request this. On the first reckoning, this could be considered unfair as it leaves the issue within the latter's own determination. But the position is the same as if he wished to institute legal proceedings, which it is open to him to do. However, we will compare such a reference to arbitration to a normal action with the result that if the party in question wishes the *arbiter* to make an award, he is heard only if he is prepared to defend himself. 10. If someone who, together with a person now deceased, had referred a matter to arbitration should prosecute a claim to the latter's estate, an award by the *arbiter* will prejudge the question of the inheritance. Therefore, in the meantime, the *arbiter* is to be prohibited from making an award. 11. The time provided in the terms of reference can be extended not just when the extension is required under the agreement but when the order of the *arbiter* is required to prevent the penalty being incurred. 12. If an *arbiter* has tried to conceal himself, the praetor ought to track him down, and if for a long time he has not appeared, a fine is to be imposed on him. 13. Where a dispute has been referred to several *arbitri* on condition that if anyone should make the award even on his own, it would hold good, in the absence of the others the one who is present may still be compelled; but if on condition that all make the award or that the decision should be in accordance with the opinion of the majority, the praetor ought not to compel them individually because the opinion of an individual *arbiter* does not lead to a penalty [if disobeyed]. 14. Where a certain *arbiter*, who clearly appeared, on grounds unconnected with the dispute, to be hostile to one of the parties, was confronted with witnesses to ensure that he would not make an award, and he still, although not compelled, persisted in making an award, the Emperor Antoninus, in an answer subscribed to the petition of a party who had presented a complaint, held that the latter could use the defense of fraud. And the same emperor, when asked his opinion by a judge before whom a penalty was sought, issued a rescript providing that even if no appeal was possible, the defense of fraud would operate as a bar to the claim for the penalty. Therefore, by means of this defense, there is a certain kind of appeal since the opinion of the *arbiter* may be reconsidered. 15. It is said to be known by all who treat of the duties of an *arbiter* that the whole discussion is to be taken from the terms of the reference to arbitration. For he will be permitted to do only what is there provided he can do. Therefore, the *arbiter* cannot decide as he pleases nor in any matter he pleases, unless there has been a reference about that matter and to the extent permitted by it. 16. A question has been raised about the making of an award, and it has been said that an *arbiter* may not make any award he pleases, although on certain points there has been controversy. And I think that there is certainly no award if the *arbiter* says that the parties must refer the matter to a judge or make a fresh reference to arbitration either to himself or to someone else. For, according to Julian, he is disobeyed with impunity if he orders the parties to go to another *arbiter*; otherwise, there would be no end to the matter. But if he made an award to the effect that land be delivered or security be given at the discretion of Publius Maevius, the award must be obeyed. Pedius approves the same view, holding that to prevent arbitrations being multiplied or transferred to other *arbitri*, at times hostile to the parties, the *arbiter* ought to make an end to the dispute by his award, and, moreover, that the dispute is not ended when the arbitration is either postponed or

transferred to another and that it is part of the award to provide how security is to be given, who are to be the guarantors; and the decision on these matters cannot be delegated unless the matter referred to arbitration was that the *arbiter* may decide on a person with discretion to determine the giving of security. 17. Likewise, if the *arbiter* orders another to be joined with him in the arbitration when this is not provided in the terms of reference, he does not make an award; for his award ought to relate to the matter referred, but on this there has been no reference. 18. Where principals who have promised by stipulation to each other wish their procurators to conduct proceedings before the *arbiter*, he can order the former themselves also to appear; 19. Again, if mention is made of the heir in the terms of reference, he can order even the heir to appear. 20. The *arbiter* also has the duty to determine in what way vacant possession is to be given. Does he also have the duty of requiring security to be given for the ratification by the principal of the procurator's act? Sextus Pedius thinks that he does but there is no reason in this. For if the principal does not ratify, the stipulation is infringed. 21. An *arbiter* can do nothing not covered by his terms of reference, and, therefore, it is necessary that these include provision for extending the time for making the award; otherwise, his order may be disobeyed with impunity.

33 PAPINIAN, *Questions, book 1:* An *arbiter*, appointed under terms of reference providing that he can also extend the time, can indeed do this, but he cannot shorten it if the parties object.

34 PAUL, *Edict, book 13:* If there are two creditors or two debtors and one refers a matter to arbitration and he is forbidden to sue or be sued, it must be seen whether, if the other sues or is sued, the penalty is incurred. The same applies in the case of bankers who operate joint accounts. And perhaps we could assimilate them to guarantors if they are partners. If they are not, there is no action against you [by your co-debtor] although I sue [him], nor is the action brought on my account, although you are sued [by my co-creditor]. 1. Once the penalty has been incurred, I think that it can correctly be said that the arbitration is ended and that no further penalty can be incurred, unless the intention was that a separate penalty be incurred in respect of each individual ground.

35 GAIUS, *Provincial Edict, book 5:* If a *pupillus* without the authority of his tutor has referred a matter to arbitration, the *arbiter* is not to be compelled to make an award because, if the opinion is against the pupillus, he is not liable to a penalty, unless he has provided a guarantor from whom the penalty can be claimed. And Julian thinks this also.

36 ULPIAN, *Edict, book 77:* If an *arbiter*, under compulsion by the praetor, makes an award on a holiday and the penalty is sought under the terms of reference, it is decided that there is no defense unless, by some statute, the very holiday on which the award has been made has been excepted.

37 CELSUS, *Digest, book 2:* Although an *arbiter* has forbidden either party to sue the other, yet, if the heir of either sues, he incurs the penalty. For the reason for referring disputes to *arbitri* is not to postpone but to end them.

38 MODESTINUS, *Rules, book 6:* When a penalty arising from a reference to arbitration is sought, the party who has incurred it is to be condemned and it makes no difference whether it was in his adversary's interest that the award of the *arbiter* stand or not.

39 JAVOLENUS, *From Cassius, book 11:* The penalty arising from a reference to arbitration is not incurred in every case where the award of the *arbiter* has not been obeyed but only where the disobedience relates to the payment of money or the provision of a service. JAVOLENUS: The *arbiter* could punish the contumacy of a party by ordering him to give money to his adversary. A party should not be deemed contumacious merely because he has not produced the names of witnesses in accordance with the wishes of the *arbiter*. 1. When the *arbiter* has ordered an extension of time for the proceedings, where he is allowed to do this, the default of one party benefits the other in that the former incurs the penalty.

40 POMPONIUS, *Various Readings, book 11:* An *arbiter* ordered the parties to appear on the first day of January and before that day died. One of the parties was not present. There is no doubt at all that the penalty is not incurred. For Aristo states that he has heard Cassius saying that in the case of an *arbiter* who himself had not appeared, the penalty was not incurred, just as Servius says that if it is through the promisee's own fault that he does not receive what is due, the penalty is not incurred.

41 CALLISTRATUS, *Monitory Edict, book 1:* Since it is provided by the *lex Julia* that a person under twenty-five is not compelled to act as judge, no one is allowed to choose someone under twenty-five as a judge in an arbitration. And, therefore, in no circumstances is a penalty arising from his award incurred. Yet many have said that someone over twenty but under twenty-five, who has rashly agreed to hear a case, is to receive help on this account.

42 PAPINIAN, *Replies, book 2:* An *arbiter* ordered the restoration of slaves within a certain time and, when they were not restored, sentenced the party in default to pay a sum of money to the imperial treasury as a penalty in accordance with the terms of the reference. The imperial treasury acquires nothing under this award, but the penalty of the stipulation is nonetheless incurred, because the appointed *arbiter* has not been obeyed.

43 SCAEVOLA, *Replies, book 1:* Lucius Titius and Maevius Sempronius appointed an *arbiter* under the terms of reference of an arbitration to hear all matters and disputes, but, by mistake, certain states of affairs were not included in the petition presented by Lucius Titius, and the *arbiter* delivered no opinion with respect to these. The question is asked whether a petition with respect to the omitted states of affairs might still be heard? He replied that it could and that the penalty arising under the terms of reference was not incurred. But if Lucius Titius had acted so out of spite, he could certainly present a fresh petition, but was liable to the penalty.

44 SCAEVOLA, *Digest, book 2:* A boundary dispute has arisen between Castellianus and Seius, and an *arbiter* has been chosen in order to conclude the affair by his arbitration. He himself made his award in the presence of the parties and established the boundaries. The question is asked whether the penalty arising under the arbitration is incurred if Castellianus did not obey the *arbiter.* I replied that if the *arbiter* was not obeyed with respect to what he had settled in the presence of both, the penalty is incurred.

45 ULPIAN, *Sabinus, book 28:* Where the terms of reference provide that the arbitration is to be conducted by a particular person, no other can act.

46 PAUL, *Sabinus, book 12:* An *arbiter* can judge concerning those matters, accounts, and disputes which were in issue between the parties at the time they made the reference to arbitration, not those which arose afterward.

47 JULIAN, *Digest, book 4:* If a reference to arbitration is made on terms that the *arbiter* make his award in the presence of both parties or their heirs and one of the parties has died leaving a *pupillus* as heir, the award is held to have been made only if the authority of the tutor was provided. 1. Likewise, if one of the parties to the arbitration became mad,

48 MODESTINUS, *Rules, book 4:* the *arbiter* is not compelled to deliver his opinion,

49 JULIAN, *Digest, book 4:* but he is even prohibited from making an award because nothing is understood to be done in the presence of a lunatic. But if the lunatic has a curator or had one, while the suit was still pending, the award can be made in the presence of the curator. 1. The *arbiter* can order the parties to appear by means either of a messenger or a letter. 2. If a reference to the heir was included by only one of the parties, the arbitration is discharged by the death of either party just as it would be if no reference to the heir of either had been included.

50 ALFENUS, *Digest, book 7:* An *arbiter* appointed under a reference to arbitration could not make his award by the time stated in the terms of reference and ordered the time to be extended. One of the parties refused to obey the order. Advice is sought as to whether he can be sued for the money established as penalty under the terms of reference. I replied that he could not for the reason that the *arbiter* was not allowed to make the order he did.

51 MARCIAN, *Rules, book 2:* If anyone becomes an *arbiter* in an affair of his own, he cannot make an award because he would be ordering himself to do something or forbidding himself to sue. But no one can either give an order or issue a prohibition to himself.

52 MARCIAN, *Rules, book 4:* If anyone ordered by an *arbiter*, under a reference to arbitration, to pay a sum of money delays in making payment, he incurs the penalty arising under the terms of reference, but if he later pays the money, he is freed from liability to the penalty.

9

LET SEAMEN, INNKEEPERS, AND STABLEKEEPERS RESTORE WHAT THEY HAVE RECEIVED

1 ULPIAN, *Edict, book 14:* The praetor says: "I will give an action against seamen, innkeepers, and stablekeepers in respect of what they have received and undertaken to keep safe, unless they restore it." 1. This edict is of the greatest benefit, because it is necessary generally to trust these persons and deliver property into their custody. Let no one think that the obligation placed on them is too strict; for it is in their own discretion whether to receive anyone; and unless this provision were laid down, there would be given the means for conspiring with thieves against those whom they receive, since even now they do not refrain from mischief of this kind. 2. Therefore, it must be seen who are liable. The praetor says: "seamen." We ought to understand a seaman to be one who manages the ship, although all are called seamen who are in the ship in order to sail it. But the praetor is thinking only of the person in charge. For he ought not, Pomponius says, to be placed under an obligation through the act of an oarsman or ordinary seaman, but through his own act or that of the master of the ship, although, if he has himself ordered something to be entrusted to one of the sailors, without doubt he ought to be under an obligation. 3. Also there are certain persons in ships who are given a position of authority in them on account of security, such as the ship's guards and the cabin stewards. Therefore, if any of these should receive anything, I think that the action is given against the person in charge, because one who gave them this office allows property to be entrusted to them, although the shipowner himself or the master performs what is called the "arrest." But even if he does not perform this, the shipowner is still liable on account of what has been received. 4. Nothing is provided about those in charge of boats or about boatmen. But Labeo writes that the same provisions ought to apply and we follow this rule. 5. Moreover, we understand innkeepers and stablekeepers equally to comprise those who carry on the business of an inn or stable and their managers. But one who fulfills

the task of a general servant is not included, as, for example, house and kitchen servants and the like. 6. The praetor says: "where they have received property on the undertaking that it will be safe," that is, whatever property or merchandise they have received. Hence, Vivianus states that this edict relates also to those things which are additional to merchandise, such as the clothing of those on board ship and other things which are in daily use. 7. Likewise, Pomponius, in his thirty-fourth book, writes that it is of little importance whether we bring in our own goods or those of another, provided that it is to our interest that they are safe; for they ought to be returned to us rather than to their owners. Therefore, if I have accepted merchandise as a pledge on account of money lent for a sea voyage, the "seaman" will be liable to me rather than to the debtor, if he has received the goods from me. 8. Moreover does the "seaman" accept goods and undertake that they will be safe only where the goods on being sent to the ship have been handed over to him, or is he held to have received the goods even if they have not been handed over, because they have been sent to the ship? And I think that he receives for safekeeping all the goods which have been brought onto the ship and that he ought to be liable for the acts not only of the crew but also of the passengers,

2 GAIUS, *Provincial Edict, book 5:* just as an innkeeper is liable for the acts of travelers.

3 ULPIAN, *Edict, book 14:* Also Pomponius, in his thirty-fourth book, writes to the same effect about the acts of passengers. The same jurist says that even if the goods have not yet been received on the ship but have been lost on shore, once the "seaman" has received them the risk is with him. 1. The praetor says: "Unless they restore, I will give an action against them." From this edict an *actio in factum* arises. But it must be seen whether this is necessary because a civil action could be brought on this ground; certainly, if there has been payment of a reward, there will be the action arising from letting or hiring. Of course, if the whole ship has been let out, the hirer will be able to bring the action on the hire, even for goods which are missing. But if the "seaman" was hired to transport the goods, he will be sued by the action arising from the letting. But if the goods have been accepted free, Pomponius says that the action on deposit could be brought. Therefore, he is surprised that the praetorian action has been introduced, since there are civil actions available, unless perchance, he says, the reason is that the praetor wished to make known to those engaged in these occupations that he was taking care to repress dishonesty; and because liability in hire is for fault, in deposit only for fraud or malice, but by this edict, in all circumstances, one who receives property is liable, even if it is lost or damage is caused without his fault, unless this happens through an unavoidable accident. Hence, Labeo writes that if anything is lost through shipwreck or an attack by pirates, it is not unfair that a defense be given to the "seaman." The same must be said if an act of *vis maior* occurs in a stable or inn. 2. In the same way, innkeepers and stablekeepers are liable with respect to what they receive in the course of their business. But if they have received anything outside the scope of the business, they will not be liable. 3. If a son-in-power or a slave has received property and obtained the consent of his father or master, the latter will have to be sued for the whole. Likewise, if a slave of the person in charge of the ship stole or caused damage, the noxal action will not lie, because the owner of the slave, the goods having been received, is sued on his own account. But if the son or slave has acted without the consent of his father or master, the action on the *peculium* will be given. 4. Moreover, this action involves a claim for the goods, as Pomponius says, and, therefore, it is given both against the heir and without restriction of time. 5. Lastly, it must be seen whether both a praetorian action on account of goods received and an action for theft can be brought in relation to the same matter. And Pomponius is doubtful. But the better opinion is that either by application to the judge or the defense of fraud, he ought to be restricted to one or other of them.

4 PAUL, *Edict, book 13:* Again, the action for theft is available to the "seaman" himself since he bears the risk, unless he should himself steal and afterward the property is stolen from him, or, in the case where another has stolen, the "seaman" himself is not

solvent. 1. If a seaman receives the property of a seaman, a stablekeeper that of a stablekeeper and an innkeeper that of an innkeeper, he will still be liable. 2. Vivianus said that this edict also related to those things which are brought in after the merchandise has been placed on board and the contract of carriage made, although no freight for them is due, such as clothing and daily provisions, because these things are themselves accessories to the contract for the carriage of the other things.

5 GAIUS, *Provincial Edict, book 5:* The seaman, innkeeper, and stablekeeper receive a reward not on account of the safekeeping of the goods, but the seaman so that he may transport passengers, the innkeeper that he permit travelers to stay in the inn, the stablekeeper that he allow beasts to be stabled with him; and yet they are liable on account of safekeeping. For the fuller and tailor receive a fee not on account of safekeeping, but for the exercise of their skill; and yet they are liable under the action for letting on account of safekeeping. 1. Whatever we have said about theft ought also to be understood about damage to property. For there ought to be no doubt that one who agrees to receive something on the understanding that it will be safe is held to undertake to keep it not only from being stolen but also from being damaged.

6 PAUL, *Edict, book 22:* Although you have sailed, or lodged at an inn, for nothing, still you will not be refused *actiones in factum* if you have suffered damage to property. 1. If you employ my slave on the ship or in the inn and he causes me loss or steals from me, although both the action for theft and that for damage to property in respect of my slave normally lie against me, yet this action, because it is *in factum*, is available against you even on account of something done by my slave. The same may be said where he is owned in common. Nevertheless, with respect to what you have paid me on his account, either under the action for dividing common property or the action on partnership, or where you have hired a share of him or all of him, you also will hold me to be under an obligation to you under the contract of hire. 2. But if loss through injury to the slave has been caused me by another who is on the same ship or in the same inn and whose acts the praetor generally assesses, Pomponius does not think that this action will lie on the slave's account. 3. The innkeeper is liable under the *actio in factum* on account of those who are living in the inn. However, this does not relate to one who is received as a passing guest, such as a traveler. 4. Moreover, we can bring against seamen the action for theft or damage to property, provided that we prove that a particular individual committed the act. But we ought to be content with one action, and, if we have sued the person in charge of the ship, we ought to make over to him our actions, although he has the action on hire against the actual culprits. But if the person in charge of the ship has been acquitted in this action and then an action is brought against the appropriate seaman, a defense will be given to prevent an offense committed by the one individual being too often the subject of investigation. And conversely, if an action is brought about the offense of one man and then an *actio in factum* is brought [against the person in charge], a defense will be given.

7 ULPIAN, *Edict, book 18:* The person in charge of the ship ought to be liable for the acts of all his sailors, whether they are free men or slaves; nor undeservedly is he liable for their acts since he himself has made use of their services at his own risk. But he is liable only if the loss has occurred on the ship itself; if out of the ship, although by sailors, he will not be liable. Likewise, if he declared that each passenger should look after his own property and that he would not be liable for loss, and the passengers have agreed to this declaration, he is not sued. 1. This *actio in factum* lies for double. 2. But if the crew have caused any damage among themselves, this will not affect the person in charge of the ship. But if a person is both sailor and merchant, the action ought to be given to him. But if any of those popularly called "persons working their passage" suffers loss, the person in charge is also liable to him; but in addition he is liable for his acts, since he is a sailor as well. 3. If a slave of a sailor has caused damage, although the slave is not a sailor, it will be most fair to give an *actio utilis* against the person in charge. 4. Moreover, the person in charge of the ship is liable

under this action on his own account, of course, in respect of his fault in employing such persons. And therefore, even if they have died, he will not be relieved. However, he is liable only noxally in respect of his own slaves. For when he employs another's slaves, he ought to investigate their reliability and integrity. In the case of his own, he deserves to be excused, whatever kind he has employed to fit out the ship. 5. If there are several persons in charge of the ship, each is sued in proportion to his share in the business. 6. These actions, although praetorian, are nevertheless without restriction of time. However, they are not given against the heir. Accordingly, if a slave has been in charge of a ship and has died, the action on the *peculium* will not be given against his master not even within the year. But when, with the consent of his father or master, a son or slave manages a ship or inn or stable, I think that the former ought also to suffer this action to the extent of the whole loss on the ground that they have undertaken liability for the whole in respect of everything which happens.

BOOK FIVE

1

ACTIONS: WHERE A MAN SHOULD SUE AND BE SUED

1 ULPIAN, *Edict, book 2:* If people submit themselves and agree to someone's jurisdiction, any judge who is in charge of a seat of judgment or has other jurisdiction has jurisdiction over those agreeing.

2 ULPIAN, *Edict, book 3:* People are considered to have agreed if they know that they are not subject to his jurisdiction and agree upon him. But if they are under the impression that he does have jurisdiction, jurisdiction will not be his; for a mistake by the litigants, as Julian too writes in the first book of his *Digest,* does not constitute agreement. Or if they thought the praetor was someone else, equally the mistake has not conferred jurisdiction. Or if when one of the litigants objected, the praetor used his powers to coerce him, he has no jurisdiction. 1. Is agreement between the parties enough or is the consent of the praetor himself also necessary? The *lex Julia judiciorum* says, "agreement between the parties." So agreement between the parties is enough. Accordingly, we must consider whether the law has been satisfied if the parties are in agreement, but the praetor is unaware that they are in agreement and thinks jurisdiction is his prerogative. In fact, it can, in my opinion, be maintained that he has jurisdiction. 2. If a judge who has been appointed for a limited period and all the litigants are in agreement, the time within which the judge has been ordered to settle the case can be extended, unless extension has been specifically forbidden by an order from the emperor. 3. The right of transfer to place of domicile is granted to legates in respect of transactions prior to their time as legates, likewise to those called away to give evidence and to anybody sent for to act as judge or given a provincial appointment. Accordingly, a person who has himself made an appeal is not also under the necessity, during the time of lodging the appeal in Rome or any other place where an appeal is lodged, of satisfying others who bring proceedings against him. For Celsus says that this man too should be given the right to transfer to his place of domicile, since it was for a different reason that he came. This view of Celsus is also reasonable. Certainly, the deified Pius said in a rescript to Plotius Celsianus that a person, summoned by himself to Rome to give an account of a tutelage, should not be compelled to defend an action on another tutelage which was not the reason for his being summoned. He also said in a rescript to Claudius Flavianus that a person under the age of twenty-five, who had requested an order for *restitutio in integrum* against Asinianus, who had come on other business, should have his request refused in Rome. 4. All these people transfer to place of domicile, if the transaction was not effected in the place where they are being sued. But if the transaction was there, they do not have the right to transfer. Legates are an exception; for even if their transactions were there, provided they took place before the legation, they are not compelled to defend

themselves in Rome so long as they are staying here for the purpose of the legation. This is what Julian writes and what the deified Pius said in a rescript. The deified Pius said in a rescript that if they stay on after the legation is over, they should obviously be taken to court. 5. Likewise, if the transaction took place outside their own province, though not in Italy, a problem arises as to whether they can be sued in Rome. In fact, Marcellus says that they have the privilege of transfer to place of domicile only with respect to transactions in their own state or certainly within the province. This is right. Furthermore, if they bring an action, they are compelled to defend themselves against all comers, though not if they sue for insult, theft, or loss which they have just suffered. Otherwise, as Julian also neatly puts it, either the affronts and losses they suffer will go unpunished or it will be in anyone's power by his attacks to make them subject themselves to jurisdiction through their attempts to seek redress. 6. But if there should be doubt whether anyone is in the position of being able to transfer to place of domicile or not, the praetor himself should decide after examination of the case. If it is agreed that he is in the position of being able to transfer to place of domicile, he will be obliged to guarantee appearance in court, the praetor deciding for what date he is to promise. But Marcellus expresses doubt as to whether he does this by means of a bare written guarantee or by furnishing sureties. In my opinion, he does so by a simple promise, and Mela too writes to this effect. Otherwise, he will be being compelled to accept trial rather than to find people to give security on his behalf. 7. In all cases in which the summons is postponed, this should operate without any temporary loss to the creditors. 8. The right of prescribing a penalty belongs to the presidents of criminal courts and not to others, unless this power has been specifically given to them.

3 ULPIAN, *Edict, book 4:* A person is not considered to be keeping out of the way to evade an action if he is under no compulsion to accept suit when present.

4 GAIUS, *Provincial Edict, book 1:* We can have no lawsuit against a person we have in power except one arising from military *peculium.*

5 ULPIAN, *Edict, book 5:* Anyone summoned before the praetor from another's jurisdiction, is obliged to come, as both Pomponius and Vindius have written. For it is for the praetor to determine whether he has jurisdiction; for the person summoned not to disregard the praetor's authority. For even legates and others who have the right of transfer to place of domicile are in the position of having to come to claim their privileges if they have been summoned to court.

6 ULPIAN, *Edict, book 6:* A blind man can act as judge.

7 ULPIAN, *Edict, book 7:* Anyone who, after being summoned to court, has become a soldier or citizen of another assize town will not in that case have the right of transfer to his own town, as he has been forestalled.

8 GAIUS, *Provincial Edict, book 2:* Anyone who, while on a legation, has agreed to a date for paying a debt incurred before the legation is not compelled to submit to trial in the place where he made the agreement.

9 ULPIAN, *Edict, book 9:* The islands of Italy are a part of Italy, and the same is true of any province.

10 ULPIAN, *Edict, book 10:* A case is considered abandoned not when it has been postponed but when it has been given up completely. For to abandon means to cease from proceedings which had been instituted with vexatious intent. Obviously, anyone who, after learning the truth of a matter, has left off his lawsuit through reluctance to continue with an unjust case which he had instituted without vexatious intent is not considered to have abandoned his case.

11 ULPIAN, *Edict, book 12:* If a person who had joined issue with me or with whom I had done so has been arrogated by me, Marcellus writes in the third book of his *Digest* that the proceedings are at an end, because it was not possible even to institute them between us.

12 PAUL, *Edict, book 17:* When a praetor forbids one of several people to act as judge, it is considered that he is entrusting this function to the rest. 1. A judge may be appointed by those who are permitted to do so by statute, *constitutio* or *senatus consultum.* A proconsul, for example, is permitted by statute. A person to whom jurisdiction has been delegated may also appoint a judge; examples are the legates of proconsuls. So also those who are traditionally allowed to do so because of the greatness of their power, for example, the urban prefect and the other magistrates in Rome. 2. Not everybody may be appointed judge by those with the right to appoint judges. For some are prevented by statute from being judges, some by nature, and some by custom. For example, the deaf and dumb, the permanently insane, and the *impubes* through lack of judgment are prevented by nature. A person expelled from the senate is prevented by statute. Women and slaves are prevented by custom, not because they lack judgment but because it is accepted that they do not perform civic duties. 3. It makes no difference whether those qualified to be judges are in power or independent.

13 GAIUS, *Provincial Edict, book 7:* In the following three actions, for dividing an inheritance, for dividing common property, and for regulating boundaries, the problem is who should be considered plaintiff, because the position of all appears to be the same. However, the prevailing opinion is that the person who appealed to the law is considered plaintiff.

14 ULPIAN, *Disputations, book 2:* But when both appeal to the law, the matter is usually decided by lot.

15 ULPIAN, *Edict, book 21:* If a son-in-power, acting as judge, makes himself liable to the damages, he is liable to the extent of the amount in his *peculium* at the time when he gave his decision. 1. A judge is thought to make himself liable to the damages when he has fraudulently given a decision in breach of the law (it is considered that he does this fraudulently if he is clearly shown to have been guilty of partiality, enmity, or even corruption) and in consequence is made to pay a just assessment of the damages.

16 ULPIAN, *Edict, book 5:* Julian is of the opinion that an action is available against the heir of the judge who made himself liable to the damages. This view is incorrect and has been much criticized.

17 ULPIAN, *Edict, book 22:* Julian says that if one of the litigants has made the judge heir to all or part of his estate, another judge must of necessity be appointed, because it is unfair to make someone judge in his own affairs.

18 ULPIAN, *Edict, book 23:* If the appointed judge is going to be prevented over too long a period from giving the matter his attention, the praetor orders his replacement, that is, if perhaps some distraction does not allow the judge to give the case his attention—the occurrence of illness, a necessary journey, or danger to his property. 1. If a son-in-power wants to go to law because of some harm done (*noxa*) for which an action is available to his father, we allow him to sue, provided that there is no one to sue in his father's name. For Julian too is of the opinion that if the son-in-power is away on a legation or for purposes of study and has suffered either theft or wrongful loss, he can sue by means of an *actio utilis* to prevent his wrongs remaining unpunished as he waits for his father, because his father is not going to come, or while he is coming, the person who did the harm is absconding. Hence, I have always supported the view that if the case arises not from crime but from contract, the son should have an *actio utilis* for, say, reclaiming a deposit or bringing an action on mandate or seeking repayment of a loan, if his father happens to be in the provinces while he himself is working in Rome either at his studies or for some other adequate reason, in order that the result of our not giving him an action may not be that he suffers wrong without redress and

endures poverty in Rome through not receiving the allowance his father had allotted him for expenses. And suppose the son-in-power whose father is in the provinces is a senator, is not the utility of the action surely increased by his position?

19 ULPIAN, *Edict, book 60:* An absent heir should be defended in the place where there was an obligation on the deceased, and if he is found there, he should be taken to court and is not exempted because of any privilege he personally possesses. 1. Anyone who has carried on a tutelage, a curatorship, business activities, banking, or anything else which gives rise to legal obligations in a particular place, even if he did not have his home there, will be obliged to defend himself there, and if he does not defend and does not have his home there, he will become subject to the seizure of his property. 2. Accordingly, if he has sold, distributed, or acquired merchandise in a particular place, it is held that he has to defend himself in this same place unless there is an agreement that he makes his defense in a different place. But surely a person who has bought anything from a strange merchant or sold to a man he knows is going to leave the place immediately ought not to take possession of his property there but follow him to his home? On the other hand, anyone who has made a purchase from one who has leased a shop or workshop in one particular spot is in a position to take him to court there. This is the more reasonable view. For when he leaves immediately after his arrival, it is like buying from a traveler, or one who calls in during the course of a journey or voyage and it is very hard for anyone to have to defend himself in all the places he comes to in his travels by land or water. But if he has established himself anywhere, I do not mean made his home there, but if he has leased a shop, stall, barn, storeroom, or workshop and sold and done business there, he will be obliged to defend himself in this place. 3. There is a problem in Labeo about a provincial who, in order to sell his merchandise, has a slave keeping a shop in Rome. A contract made with the slave should be regarded as one made with his master, so his master will have to defend himself there. 4. The following should be noted: If a man under an obligation to make a payment in Italy had his home in a province, he can be taken to court in either of the two places. Julian and many others are of this opinion.

20 PAUL, *Edict, book 58:* We should consider that every obligation ought to be regarded as a contract, so that whenever anyone incurs an obligation, it is held that a contract is also formed, even if the debt is not the result of a loan.

21 ULPIAN, *Edict, book 70:* If I am intending to give my debtor notice of an action, a view that will deserve support is that if he admits the debt and says he is ready to pay, he should not be rebuffed, and a day should be fixed with suitable security for paying the money. For there is no great loss in a fairly short period of delay. "A fairly short period" should here be taken to mean the period allowed to defendants after condemnation.

22 PAUL, *Plautius, book 3:* If a person who is not compelled to submit to trial in some place himself brings an action there, he is compelled to agree to actions and to be sent before the same judge.

23 PAUL, *Plautius, book 7:* What took place after the acceptance of an action cannot be regarded as becoming part of it. For this reason another lawsuit is needed.

24 PAUL, *Plautius, book 17:* An action is only available at Rome against persons summoned by the emperor, if it was at this time that they entered into an agreement. 1. Legates are compelled to submit to trial at Rome for offenses committed in the course of the legation whether they themselves were responsible or their slaves. 2. But if an application is made for an action for a thing (*actio in rem*) against a legate, should it be granted, since this action arises out of possession at the present time? Cassius replied that the principle to be observed was this: The action should not be allowed if the legate would be prevented from performing his duties, if, on the other hand, the action is about only one out of many slaves, it should not be withheld. Julian

said the action should be categorically refused. Rightly so, for the reason for not granting the action is so that he may not be distracted from the duties he has undertaken as legate.

25 JULIAN, *Digest, book 1:* If anyone during the period of the legation has bought or acquired possession by any other means of a slave or any other thing, it will not be unfair to compel him to accept trial on its account. For otherwise legates under this cover will be given the power to carry off home things belonging to other people.

26 PAUL, *Plautius, book 17:* As for the legate who has accepted an inheritance, Cassius writes that to avoid hampering the work of the legation, an action is not available against him, even though he accepted the inheritance in Rome, and this is correct. Furthermore, the legatees are not granted an action either, but unless he gives security, they are allowed into possession of the things of the inheritance. This should also be said with regard to the creditors of the inheritance.

27 JULIAN, *Digest, book 1:* For what prevents a legate performing his public duties and a manager being in possession of the things belonging to the inheritance to protect them?

28 PAUL, *Plautius, book 17:* But even if the inheritance is made over to him under the *senatus consultum Trebellianum*, an action will not be granted against him, whether the heir accepted the inheritance voluntarily or under compulsion. For it is more convenient for the inheritance to be made over to him, and the position should be regarded as the same as if he had himself accepted the inheritance. 1. On the other hand, if the legate accepted and made over the inheritance during the period of the legation, an action *is* granted against the beneficiary under the *fideicommissum*, and the defense based on the *senatus consultum Trebellianum* presents no obstacle resulting from the legate's position because this privilege is personal to the legate. 2. For the same reasons that a legate is not compelled to accept trial, he is not compelled either to take an oath that he has no obligation to convey, because this oath takes the place of joinder of issue. 3. A legate ought to give a guarantee against danger of loss (*damni infecti*) on account of a house or allow his neighbor to take possession. 4. Again, if the time for an action is almost up, the praetor should, after examination of the case, grant an action against him with provision made at the joinder of issue for transfer to a province. 5. If the head of a household has died leaving one son and a pregnant wife, it is wrong for the son to claim payment of one half of a loan from debtors, even though afterward only one son was born, because more could have been born although the laws of nature made it certain that only one was in process of being born. But Cassius and Sabinus said only a quarter should have been claimed, because it was not known whether three might be born, and we should not look at the laws of nature where everything was certain, since what was to be would undoubtedly come into being, but have regard to our own ignorance.

29 PAUL, *Plautius, book 8:* The first to call for payment is plaintiff.

30 MARCELLUS, *Digest, book 1:* An action should be completed in the place where it has once been accepted.

31 CELSUS, *Digest, book 27:* If a claimant has left several heirs and only one of them has gone to law, it will not be right to bring in all that was at stake in the former action. For no one can bring into court an action that is another's right without the consent of his co-heir.

32 ULPIAN, *Duties of Consul, book 1:* If a judge who had been given a time limit has died and another has been appointed in his place, we shall take it that the same length of time has been fixed afresh in his case, although the magistrate did not expressly say this in appointing the successor, with however the qualification that he should not exceed the statutory time.

33 MODESTINUS, *Rules, book 3:* He who requests to be informed of the nature of an action before a judge is not considered to have agreed to this same judge.

34 JAVOLENUS, *From Cassius, book 15:* If a man who had accepted trial in Rome has died, his heir must be defended in Rome even though he has a home across the sea, because he takes the place of the man who left him as his heir.

35 JAVOLENUS, *Letters, book 10:* An action cannot be in suspense or about things which are only later going to come under a legal obligation in the way that the obligation of a *fideiussor* can be in suspense and even framed with reference to the future. For I think no one will doubt that a surety can be accepted before his principal enters into an obligation, whereas an action cannot be, before something is due.

36 CALLISTRATUS, *Judicial Examinations, book 1:* Sometimes, for adequate reasons and because of the nature of the persons involved, judicial examinations should be postponed, for example, if the documents in a case are said to be in the possession of persons who will be away on public business; and this was laid down by the deified brothers in a rescript in these words: "It is humane for postponement to be allowed where misfortunes have occurred, for example, because during litigation a father has lost a son or daughter, or a wife a husband, or a son a parent, and in circumstances of this sort for the examination to be deferred to a future date." 1. If a senator has involved himself in the affairs of another in a province, he should not object to a suit for unauthorized administration, but, as Julian said in a reply, he is obliged to face the action, since it was of his own free will that he took this obligation upon himself.

37 CALLISTRATUS, *Judicial Examinations, book 5:* If a case is concerned with force and possession, the deified Hadrian said, in a rescript written in Greek to the Council of the Thessalonians, that the question of force must be gone into before that of ownership.

38 LICINNIUS RUFINUS, *Rules, book 4:* If a legacy is claimed by an *actio in personam,* it should be made over in the place in which it is, unless it has been removed with fraudulent intent on the part of the heir; for in that case it should be made over in the place where the claim is made. Moreover, anything specified by weight, number, or measure should be made over in the place where the claim is made, unless there is an additional instruction—"a hundred measures from that barn" or "amphoras of wine from that cask." But if a legacy is claimed by an *actio in rem,* the place where the thing is should also be the place of the claim. And if the thing is movable, it will be possible to bring an action for production against the heir to make him produce the thing; for in this way it will be possible for the legatee to make his claim by *vindicatio.*

39 PAPINIAN, *Questions, book 3:* When a lunatic has been appointed judge, the fact that he cannot act as judge today does not mean that the proceedings will be invalid; and so the verdict he gives, after, of course, he has recovered his sanity, will be binding; for neither the presence nor knowledge of the judge is essential at his appointment. 1. A person who has come to Rome as a legate may provide verbal guarantees for any reason whatsoever, although he cannot avail himself of his privilege since he entered into the agreement in Italy.

40 PAPINIAN, *Questions, book 4:* Not every decision that is entrusted to the power of a judge becomes legally binding. 1. If in the performance of his duty a judge has with fraudulent intent disregarded anything contrary to the provision of a statute, he is in breach of the law.

41 PAPINIAN, *Questions, book 11:* In all actions of good faith, if someone applies for the introduction of a guarantee (*cautio*) when the day for paying the money has not yet arrived, his action will be successful only if there are adequate grounds.

42 PAPINIAN, *Questions, book 24:* If a wife has ended her marriage with a legate while in Rome, an opinion has been given that the husband's defense in a claim for the dowry must be made in Rome.

43 PAPINIAN, *Questions, book 27:* It is agreed that he who has taken a stipulation for

the erection of a tenement in Capua by a certain date can sue for his interest anywhere once the time is up.

44 PAPINIAN, *Replies, book 2:* A judge is not prevented from exercising his function because, after a suit has been begun against all the tutors, certain of them absent themselves on public business, since the management of those present and those not defended can be separately assessed. 1. When a man in whose name a procurator had brought legal proceedings has afterward been shown to be a slave, his debtor should be acquitted; but this will not stand in the way of his master at some time bringing a suit of his own.

45 PAPINIAN, *Replies, book 3:* A banker should be taken to court in the place where an agreement was entered into, and in this matter postponement should only be granted for an adequate reason, so that account books may be brought from a province. The same opinion is held with regard to an action on tutelage. 1. When a girl's tutors have been condemned in a province in her name, the girl's curators are compelled to carry out the judgment in Rome, the place where the mother, whose daughter became her heir, received the loan.

46 PAUL, *Questions, book 2:* A man who has been made a judge continues to hold the position, even though he has gone mad, because his initial appointment as judge was correct. But serious illness removes the compulsion to act as judge. Therefore, a change ought to be made.

47 CALLISTRATUS, *Questions, book 1:* The practice should be followed of not making judge a person asked for by name by one of the parties—for the deified Hadrian said in a rescript that it set a precedent for unfairness—unless permission for this is specifically granted by the emperor out of regard for the integrity of the judge asked for.

48 PAUL, *Replies, book 2:* Part of a letter from the deified Hadrian: "Magistrates in their year of office are not to enter upon actions of their own, either as plaintiffs or defendants, nor [to judge in the cases] of those whose tutors or curators they are. When their term of office runs out, legal proceedings can be initiated both by them against the defendants and by the defendants against them."

49 PAUL, *Replies, book 3:* A seller, given notice by the buyer that he has to defend him against dispossession, says he has a right to his own judge. The question is whether he can have the case transferred to his own judge from the judge before whom proceedings between claimant and buyer began. Paul's reply was that it was usual for the seller to go before the buyer's judge. 1. It is usual for judges appointed by a governor to carry on still into the periods of office of his successors for them to be compelled to give judgment and for these decisions to be upheld. Scaevola too replied to the same effect.

50 ULPIAN, *Fideicommissa, book 6:* If someone is called upon to carry out a *fideicommissum* and he says that the greater part of the inheritance is elsewhere, he will not be compelled to fulfill it; and it has been laid down in many *constitutiones*, that the discharge of a *fideicommissum* should be claimed where the greater part of the inheritance is, unless it is proved that the testator wanted the *fideicommissum* to be discharged in the place where the claim is made. 1. There has been discussion with regard to debt as to whether, if liabilities exceed assets in the province where a claim is made for the discharge of a *fideicommissum*, the objection that the greater part was elsewhere should be applicable. But here too it has been decided that the account a debt arose under makes no difference, since a debt is the liability not of a place but of the assets as a whole; for it has been agreed that a debt diminishes an estate as a whole, not the assets in a particular place. But if this part of the estate happens to have been designated to bear certain burdens, for example, provision of maintenance which the head of the household had ordered to be provided in Rome or taxes or certain other unavoidable burdens, could this objection be apposite? Here I would think it is more justifiably said to apply. 2. Again, there is a rescript saying that the

discharge of a *fideicommissum* should be claimed where the heir has his home. 3. No one who has begun to fulfill a *fideicommissum* can avail himself of this objection,

51 MARCIAN, *Institutes, book 8:* even though the inheritance has gone to a man who has his home in a province. Furthermore, both the deified Severus and the deified Antoninus said in rescripts that if the trustee has agreed to discharge the *fideicommissum* in another place, he has to discharge it in accordance with the agreement in the place where he agreed to.

52 ULPIAN, *Fideicommissa, book 6:* Again, if he has taken on an action on *fideicommissum* and, while making use of other defenses, has neglected this one, he cannot afterward have recourse to this defense even before the verdict. 1. If the testator said in his will that tickets for corn were to be bought for his freedmen, even though the greater part of the inheritance is in a province, it should still be said that the *fideicommissum* ought to be discharged in Rome, since it is clear from the nature of the purchase that this was the testator's wish. 2. Again, in a case where certain distinguished (*clarissimis*) gentlemen have been left quantities of gold or silver and there is sufficient of the estate in Rome for the discharge of *fideicommissa* of this sort, even though the greater part of the estate as a whole is in a province, it should be said that the *fideicommissum* ought to be discharged in Rome; for it is unlikely that the testator, who only wanted to show his respect to men to whom he left such moderate amounts of money by *fideicommissum*, wanted the discharge to take place in a province. 3. If the thing which has been left by *fideicommissum* is in a certain place, it should be said that the fact that the greater part of the inheritance is elsewhere ought not to be made into a ground for objection against the claimant. 4. We must consider whether the objection is apposite if it is not the discharge of a *fideicommissum* that is claimed in a particular place, but only security for it. In my opinion, it is not apposite. Indeed, even if there is nothing in a particular place, an order for security should still be given. For what has he to fear since, if he does not give security, his opponent is granted *missio in possessionem* only for the purpose of safeguarding the *fideicommissum*?

53 HERMOGENIAN, *Epitome of Law, book 1:* Permission for slaves to go to law against their masters is granted with reluctance and only for specific reasons, that is, if any allege that the pages of a will in which, they claim, they were left their freedom have been suppressed. Likewise, slaves are allowed to expose masters charged with forcing up the price of the Roman people's grain also with a false census declaration and with counterfeiting coins. Furthermore, they will claim their freedom from their masters if it has been left to them by *fideicommissum*, as will those who assert they have been bought with their own money and not manumitted, contrary to the spirit of their agreement. The slave too, who has been given his freedom by will on condition he presents his accounts, has the right to ask for an *arbiter* in his dealings with his master for sorting out his accounts. Also if a slave has relied on someone's good faith to buy him with his own money and manumit him when this has been repaid, and the purchaser refuses to take the money when proffered, the slave is given the opportunity of bringing to light the spirit of their agreement.

54 PAUL, *Views, book 1:* A more important lawsuit should not be prejudged through a less important case; for the more important proceedings influence the less important case.

55 PAUL, *Duties of Assessors, sole book:* An edict issued by a predecessor should be counted among the three edicts. Even though the predecessor has completed the whole series, it is quite usual for his successor to issue one.

56 ULPIAN, *Sabinus, book 30:* Although it is most proper for a genuine procurator to bring a matter into court, yet even if someone has joined issue when not procurator and his principal has then given his ratification, his action in bringing the matter into court is considered retrospectively correct.

57 ULPIAN, *Sabinus, book 41:* Actions arising from contracts as well as from delicts are available against a son-in-power, but if the son dies after joinder of issue, the suit

is transferred to his father with a liability limited to the *peculium* and to the benefit he has gained. Obviously, if a son-in-power accepted a suit as someone's procurator, after his death liability for a compromise even on judgment passes to the person he defended.

58 PAUL, *Sabinus, book 13:* A trial comes to an end if stopped by the person who had ordered it or by one having superior power with the same jurisdiction or again if the judge himself acquires the same power as the person who ordered the trial.

59 ULPIAN, *Sabinus, book 51:* If a place has not been specified in the order for a trial, he is considered to have ordered it in the usual place for trials, provided there is no inconvenience to the litigants.

60 PAUL, *Sabinus, book 14:* On the death of a judge, his substitute ought to keep to the same issue which it had been his predecessor's duty to judge.

61 ULPIAN, *Edict, book 26:* We are certainly accustomed to say that what comes before a court is what has been decided on between the litigants; but Celsus says this definition is dangerous because of the attitude of the defendant, who, in order to escape condemnation, will always say there has been no agreement on this. It is better therefore to say that what comes into court is not what it has been decided should come, but that what does not come before the court is what it has been specifically decided should not come. 1. A larceny judge cannot act as judge in a civil case.

62 ULPIAN, *Edict, book 39:* The only way of settling an action between litigants is by one being claimant and the other being possessor; for there must be one to bear the burdens of the claimant and one to enjoy the advantages of the possessor.

63 ULPIAN, *Edict, book 49:* To be properly defended is to accept an action either in one's own person or through someone else, though with security, and it is not considered that one who does not satisfy judgment is defended.

64 ULPIAN, *Disputations, book 1:* The assessment of the judge in a case of fraud is made not in accordance with the loss incurred, but in accordance with the claim made under oath. Indeed, it is for this reason that the action is available also against one who has appropriated a deposit or loan. 1. If anyone has received security for the satisfaction of judgment while about to bring one action and then brings another, the stipulation will not become operative, because it is held that the guarantee was given with regard to a different matter.

65 ULPIAN, *Edict, book 34:* A wife should lay claim to her dowry in the place where her husband had his home, not where the dowry agreement was drawn up; for it is not the sort of contract in which the place where the dowry agreement was made has also to be considered rather than the man to whose home the wife herself was due to go under the conditions of the marriage.

66 ULPIAN, *Disputations, book 2:* If anyone's purpose or words were ambiguous, the interpretation more to his advantage should be the one adopted.

67 ULPIAN, *Disputations, book 6:* If a slave who says he has been purchased with his own money succeeds in proving this, his freedom will date from the time of the purchase, because the *constitutio* does not say he should be declared free but orders his freedom to be restored to him. Accordingly, he will have to be compelled to manumit the slave who has purchased himself with his own money. Furthermore, if he is evasive, precedents under *senatus consulta* dealing with freedom left under a *fideicommissum* should be invoked.

68 ULPIAN, *Disputations, book 8:* The peremptory edict is arrived at by the following stages. First, after the nonappearance of the other party, one asks for the first edict, then for the second

69 ULPIAN, *All Seats of Judgment, book 4:* during the course of an interval of not less than ten days,

70 ULPIAN, *Disputations, book 8:* and for the third. After these have been issued, one then obtains the peremptory edict. This got its name from the fact that it put an end (*peremeret*) to contention, that is, it did not allow further evasion by the other party.

71 ULPIAN, *All Seats of Judgment, book 4:* In a peremptory edict, the person who issued it threatens to examine and decide the case even while the other party is still absent.

72 ULPIAN, *Disputations, book 8:* Sometimes this edict is issued after the above number of edicts has preceded it, sometimes after one or two, sometimes immediately; and this is called the one for all. This is something for the magistrate to decide, and he should regulate the spacing or the number of the edicts in accordance with the nature of the case, the person or the time.

73 ULPIAN, *All Seats of Judgment, book 4:* And after a peremptory edict has been obtained, on the day named in it, the absent party should be summoned and, whether he does or does not respond, the case will proceed and a verdict will be given, not necessarily in favor of the party who is present, but sometimes even the absent party will win, if he had a good case. 1. But if he who obtained the peremptory edict is absent on the day of the hearing, whereas the party against whom it was obtained is present, then the peremptory edict should be canceled, the case will not be given a hearing nor will a decision be given in favor of the party who is present. 2. Let us consider whether, after the edict has been canceled, the defendant can be taken to court again or whether an action is still available and only the prevention of delay by the edict has been lost. In fact, the better opinion is that only the prevention of delay has been lost, and it is possible to bring proceedings afresh. 3. It should be noted that if a person condemned in his absence, following a peremptory edict, appeals, he should be refused a hearing if his absence was due only to willful disobedience; if not, he will be given a hearing.

74 JULIAN, *Digest, book 5:* A judge should also be compelled to give a decision on a case he has tried. 1. A judge who has been instructed only to go up to a certain sum in his judgment is able also to give a judgment for a larger amount if the litigants agree to it. 2. Wishing to defend someone in his absence, I accepted suit when he was already dead and made payment after losing the case. The question was whether the heir was freed from liability, and what action was available to me against him. I replied that a suit which is accepted through his defender when the debtor is already dead is of no effect, and for this reason the heir is still liable; as for the defender, if he made payment to satisfy judgment, though he cannot reclaim it, he does, however, have an action for unauthorized administration against the heir, who, of course, would be able to protect himself by a defense of fraud if taken to court by the plaintiff.

75 JULIAN, *Digest, book 36:* If the praetor has ordered a man sued for debt to appear in court and, after the series of edicts has been issued, has pronounced in his absence that he owes the money, a judge who tries an action on judgment should certainly not try the praetor's rulings; otherwise, edicts and decrees of this sort by praetors will be futile. MARCELLUS adds a note: If he has fraudulently and deliberately made a false statement and it has been clearly proved that it was by this means that he gained the praetor's decision, I think the judge should allow a complaint by the defendant. PAUL adds a note: If the defendant was unable to appear because prevented by illness or because called away on public business, my opinion is that either an action on judgment against him should in this case be refused or that in these circumstances, the praetor ought not to execute the judgment.

76 ALFENUS, *Digest, book 6:* The case was put that several of the judges appointed for the same trial had been excused after the case had had a hearing, and others had been put in their place. The question was whether the replacement of individual judges had resulted in the same case or a different court. I replied that not merely if one or two, but even if all had been changed, the case and the court both still remained the same as

they had been before. And this was not the only example of a thing being considered the same after its parts had been changed, but there were many others too. For a legion too was held to be the same although many of its members had been killed and others had been put in their place. A people too was thought to be the same at the present time as it had been a hundred years ago, although no one was now alive from that period. Likewise, if a ship had been repaired so often that no plank remained the same as the old had been, it was nevertheless considered to be the same ship. For if anyone thought that a thing became a different one when its parts were changed, it would follow from this reasoning that we ourselves would not be the same as we were a year ago, because, as the philosophers said, the extremely tiny particles of which we were made up daily left our bodies and others came from outside to take their place. Therefore, a thing whose appearance remained the same was considered also to be the same thing.

77 AFRICANUS, *Questions, book 3:* In private cases a father can have a son and a son a father as judge,

78 PAUL, *Plautius, book 16:* since to act as judge is a public duty.

79 ULPIAN, *Duties of a Proconsul, book 5:* He who, it is agreed, has without cause summoned the other party to court will be obliged to pay the other party's traveling and legal expenses. 1. It is customary for governors to answer the questions of judges on points of law, whereas, when they ask about points of fact, governors ought not to give advice but instruct them to give their decision in accordance with their oaths; for this sometimes brings disrepute and affords an opportunity for partiality and favoritism.

80 POMPONIUS, *Sabinus, book 2:* If a mistake with regard to his *praenomen* has been made in naming the judge, Servius said in a reply that if the judge had been appointed as the result of agreement between the litigants, the judge was the person the litigants had agreed on.

81 ULPIAN, *Opinions, book 5:* A person who is not in charge of the administration of justice was not given any power by the emperor, was not appointed by one with the right to appoint judges, was not chosen by mutual agreement, and did not owe his position to any statute could not be a judge.

82 ULPIAN, *Duties of a Consul, book 1:* Sometimes magistrates of the Roman people are in the habit of naming one of their attendants to act as *arbiter*. This should only be done on rare occasions and in cases of necessity.

2

THE UNDUTIFUL WILL

1 ULPIAN, *Edict, book 14:* It should be noted that complaints against the undutiful are common; for it is possible for everyone to argue want of duty, parents as well as children. For one's cognates beyond the degree of brother would do better not to trouble themselves with useless expense since they are not in a position to succeed.

2 MARCIAN, *Institutes, book 4:* The supposition on which an action for undutiful will is brought is that the testators were of unsound mind for making a will. And by this is meant not that the testator was really a lunatic or out of his mind but that the will was correctly made but without a due regard for natural claims; for if he were really a lunatic or out of his mind, the will is void.

3 MARCELLUS, *Digest, book 3:* To say a will is undutiful is to argue one should not have been disinherited or passed over. This generally happens when parents disinherit or pass over their children through a misunderstanding.

4 GAIUS, *Lex Glitia, sole book:* For parents should not be allowed to treat their children unjustly in their wills. They generally do this, passing an adverse judgment on their own flesh and blood, when they have been led astray by the blandishments or incitements of stepmothers.

5 MARCELLUS, *Digest, book 3:* For those who are not descended in the male line also have the power to bring an action, since they do so in respect of a mother's will and are constantly accustomed to win. The force of the expression "undutiful" is, as I have said, to indicate that one has been undeservedly and therefore wrongly passed over or even excluded by disinherison, and this position is maintained before the judge by arguing that the testator appears, in a way, to have been of unsound mind when he drew up an inequitable will.

6 ULPIAN, *Edict, book 14:* A posthumous child can make a complaint of undutiful will against those whose *suus* or *legitimus heres* he would have been, if he was conceived before the time of their death. Indeed, he can do so against cognates also, because he could have been granted possession of their property too on intestacy. Are these people then being criticized for not dying intestate? But no one could succeed with this argument before a judge; for there is no prohibition on making a will. What he can obviously be criticized for is this, for not writing him in as heir; for if he had been written in as heir, he could have been granted possession in accordance with the clause about granting possession to the unborn child, and after birth he would have had possession in accordance with the will. Similarly, I maintain that the child born by Caesarean section after the making of his mother's will can also make a complaint. 1. If one of the persons not entitled to succeed on intestacy brings an action for undutiful will (for there is no one to stop him) and happens to win, his victory would benefit not him but those with the right of succession on intestacy; for he makes the head of the household intestate. 2. If anyone dies after beginning an action for undutiful will, would he pass his complaint on to his heir? Papinian replied—and this is also made clear in certain rescripts—if he died after the acceptance of possession of the property, there is succession to the action. And in my opinion, even if possession of the property has not been claimed but a dispute has already begun or been envisaged or if he died on his way to bring his complaint of undutiful will, the complaint passes to the heir.

7 PAUL, *Septemviral Court, sole book:* Let us consider what preparations for a suit anyone must be seen to have made in order to be able to pass on the action. And let us suppose that he was in power, so that taking possession would not be necessary for him and acceptance of the inheritance superfluous. If he has only threatened proceedings or gone as far as giving notice or delivering his petition, he will pass on the action to his heir; and this the deified Pius said in a rescript concerned with delivery of petition and giving notice. But if he was not in power, would he then pass on the action to his heir? In fact, it is considered that he has taken adequate preliminary steps for his suit if he has done the things which we mentioned above.

8 ULPIAN, *Edict, book 14:* Papinian in the eighth book of his *Questions* is correct when he writes that a father cannot bring a complaint of undutiful will in his son's name without the son's consent; for the injury is to the son. In a later passage, he

writes that if the son has died after possession has been accepted in order to institute proceedings, the complaint of undutiful will is at an end, since it was not granted to the father, but in the son's name. 1. If anyone after commencing an action for undutiful will abandons his case, he will be refused a hearing later. 2. It has often been stated in rescripts that a complaint of undutiful will can be brought even if the emperor has been appointed heir. 3. Papinian in the second book of his *Replies* says a complaint of undutiful will lies against the will of the head of a household who was a veteran, even if his only property had been acquired during his army service. 4. If anyone made a will while on military service and died within the year following his service, a complaint of undutiful will may not be applicable since, because of the soldier's privilege, his will is valid for that length of time. In fact, it can be stated that it is not applicable. 5. Further, the mother of a son who is *impubes* cannot bring a complaint of undutiful will because the father made the will for him (and this was Papinian's reply), nor can the father's brother, because the will is that of the son. So the brother of the *impubes* cannot do so either, unless he has done so against the father's will. But if an attack has been made on the father's will, the son's will will not be valid either unless the father's will has been set aside only in part; for in that case the will of the *pupillus* is valid. 6. If anyone *mortis causa* has made his son a gift of a quarter of what would come to him if the head of the household died intestate, I think his will is in no danger. 7. If anyone has appointed a substitute for a son who is *impubes* by making a second will, we will not because of this allow the *impubes* to bring a complaint of undutiful will. 8. Since a quarter of the share due is enough to prevent a complaint, we shall have to consider whether a disinherited person who does not complain counts, for example, if two sons have been disinherited. In fact, he certainly will count, as Papinian said in a reply; and if I bring an allegation of undutifulness, I should claim not the whole inheritance but only half of it. Accordingly, if there are grandchildren by two sons, several by one, let us say three, but only one from the other, a gift of an eighth prevents the only child from bringing a complaint and a gift of one twenty-fourth any one of the others. 9. A quarter will obviously be taken to mean a quarter after the deduction of debts and funeral expenses; but we must consider whether gifts of freedom also diminish the quarter. In fact, they surely should not. For if, when anyone has been appointed heir to the whole of an estate, he cannot bring a complaint of undutiful will, because he has the Falcidian share, and if the Falcidian share does not diminish gifts of freedom, it could be said that he must have a quarter share after gifts of freedom have been deducted. Suppose, therefore, it is held that the quarter share is diminished by gifts of freedom, the result will be that the man whose estate consists entirely of slaves would, in giving them their freedom, prevent a complaint for undutiful will, unless perhaps the son, if he was not in power, although appointed heir by his father, rightly does nothing about the inheritance, and, letting it pass to a substitute, institutes proceedings for undutiful will, or takes the inheritance on intestacy without penalty under the Edict. 10. If a testator has instructed an heir to fulfill a condition in respect of a son or other person who can bring the same complaint and this person has in full knowledge accepted fulfillment, we must consider whether he should be refused a complaint of undutiful will; for he has accepted the testator's judgment. It is the same also if a legatee or *statuliber* has made over a gift to him. In fact, it can be said that he is refused, particularly if he had instructed the heir to make the gift over to him. But if it was a legatee he had instructed, surely a gift through a legatee ought not to prevent a complaint of undutiful will once it has become possible. Then, why did we speak so categorically as regards the heir? Because a complaint is only possible after acceptance of an inheritance. My opinion is that in this matter the guidance of events should be followed so that if delivery of what he has been left takes place before the beginning of a suit, he should be considered satisfied, since it was in accordance with the wishes of the testator that the delivery was made. 11. Hence, if anyone has

been made heir, say, to half when only a sixth of the testator's property was due to him and had been asked after a specified period of time to make over his inheritance, it should be said that he has no right to an action, since it would be possible for him to have his due share and its fruits; for it is well known that the fruits are usually added on to the Falcidian share. Therefore, even if he is asked after ten years to make over his inheritance after initially being made heir to half, he has no ground for a complaint since in the intervening time he could easily amass his due portion and its fruits. 12. Anyone alleging that a will is both invalidated or broken and undutiful should be made to choose which action he wants to bring first. 13. If a son who has been disinherited is in possession of an inheritance, even though the heir in the will (*scriptus*) institutes a claim for it, the son should, by way of reply, bring in a complaint, just as he would do if he were not in possession but instituting a claim. 14. One should bear in mind that a person who has without justification brought a complaint of undutiful will and been unsuccessful loses what he received under the will, and this is claimed for the imperial treasury on the ground that he did not deserve it. But only the person who has continued with an unjustified suit right up to the judges' verdict has what he was given under the will taken from him. But if he has left off or died before the verdict, what he was given is not taken from him. Accordingly, it can be said that if judgment is given in his absence in favor of the party in court, he should also keep what he has received. Moreover, a person should only lose what brings benefit to him. But if he has been asked to make this over, no injustice should be done. Hence, Papinian rightly says in the second book of his *Replies* that if an heir has been appointed and asked to make over the inheritance but has then been unsuccessful in a complaint of undutiful will, he only loses what he would have had by right of the Falcidian share. 15. If any *impubes* of those who can, unless adopted or emancipated, make a complaint of undutiful will has been adrogated, he should, in my opinion, lose the right to make a complaint, since he has his quarter under a *constitutio* of the deified Pius. But if he has sued unsuccessfully, should he lose his quarter? In my opinion, he ought either not to be allowed to bring a complaint of undutiful will, or if he is allowed, even if he has been unsuccessful, his quarter should be allowed him as a sort of debt. 16. If a judge has examined a complaint of undutiful will, given a verdict against the will, and there has been no appeal, the will is nullified automatically, the person in whose favor the verdict went will become *suus heres* and possessor of the property, if this is his object, gifts of freedom are automatically void, legacies are not due, and ones discharged are reclaimed either by the person who discharged them or by the successful litigant, and they are reclaimed by means of an *actio utilis*. Usually, if they were discharged before the dispute began, the successful litigant reclaims. This is in accordance with rescripts of both the deified Hadrian and the deified Pius. 17. Clearly, if for some weighty and adequate reason a complaint of undutiful will was only begun after five years, gifts of freedom which became due or were bestowed ought not to be revoked, but the successful litigant should be paid twenty aurei each for them.

9 MODESTINUS, *Undutiful Wills, sole book:* If he has brought an action within five years, gifts of freedom do not hold good. But Paul says he will discharge the gifts of freedom made under a *fideicommissum*, obviously in this case for a payment of twenty aurei each.

10 MARCELLUS, *Digest, book 3:* If some of the judges in a case of undutiful will decide against the will, others in its favor, as is accustomed sometimes to happen, it will be more humane to go along with the view in favor of the will unless it becomes clearly apparent that the pronouncement of the judges in favor of the heir in the will (*scriptus*) was unjust. 1. It is very obvious that it is not right for a person who has received a legacy to act as judge in a case of undutiful will, unless he handled the legacy entirely for another's benefit.

11 MODESTINUS, *Replies, book 3:* I replied that even if a complaint of undutiful will has

succeeded, gifts which the testator is alleged to have made during his lifetime are not, however, for that reason rendered void and no claim can be made for part of what has been given as dowry.

12 MODESTINUS, *Prescriptions, sole book:* It makes no difference whether a disinherited son has accepted a legacy left to himself or acquired it through its being left to a son or slave; for in either case he will be barred by a prescription. Indeed, even if he has manumitted a slave appointed heir before ordering him to accept the inheritance, so that the slave may accept the inheritance by his own decision, and has done this with fraudulent intent, he will be barred from bringing an action. 1. If a disinherited person commences a claim for money against a *statuliber*, he is considered to have accepted his parent's judgment. 2. If a son has been barred when he began a claim for a legacy that had suffered ademption and resorts to a complaint of undutiful will, he should not be prevented by a prescription; for although by his action he has registered approval of the will, yet there is some blame to be imputed to the testator, so that it is right that the son should not be barred. 3. The son of the testator, who had been liable for the same sum of money as Titius, will not be barred from an action for undutiful will by the fact that he has been freed from his liability, because Titius was left freedom from his through a formal release.

13 SCAEVOLA, *Replies, book 3:* Titia appointed her daughter heir and gave a legacy to her son. In the same will, she made the following provision: "Everything which I ordered above to be given or done I want given and done by any heir or possessor I shall have, even on intestacy. Likewise, I commit to his trust the giving and doing of what I shall order to be given." The question is: If a sister wins her case before the Centumviral Court, ought the *fideicommissa* from the section given above to be carried out? I replied: If the question is this, whether the law allows anyone to impose *fideicommissa* on those he believes will succeed him as heirs or possessors on intestacy, I replied that it does. PAUL adds a note: But he makes the point that *fideicommissa* imposed on intestacy do not become due on the ground that they have been imposed by a madman.

14 PAPINIAN, *Questions, book 5:* A father emancipated his son and kept [in power] his grandson by him. The emancipated son afterward begat and acknowledged a son, disinherited two, passed over his father in his will, and died. In the trial of a complaint of undutiful will, the father's action remains in suspense while the sons' case takes precedence. But if judgment is given against the sons, the father is summoned to bring his complaint and can bring his own action to completion.

15 PAPINIAN, *Questions, book 14:* For even though inheritance from sons is not due to parents because of the parents' longing and natural love for sons, yet once the natural order of death has been broken, due respect demands that parents no less than children should inherit. 1. The heir of a man who, after the preliminaries of a suit for undutiful will, changed his mind and then died is not granted a complaint of undutiful will; for it is not enough to begin an action if he does not carry on with it. 2. A son who, after taking two heirs to court in an action for undutiful will, got differing decisions from the judges, defeating one heir and being beaten by the other, can in part sue debtors and himself be sued by creditors and also claim items and divide up the inheritance. For it is right for an action for dividing an inheritance to be available, since we believe that he has become in part a *legitimus heres*, and for this reason, part of the inheritance has remained subject to the will; and it does not seem ridiculous to be held intestate in part.

16 PAPINIAN, *Replies, book 2:* When a son has already brought an action for his share against a brother appointed heir with a complaint of undutifulness against his mother's will and been successful, a daughter who has not brought an action or not been successful does not join her brother in receiving her statutory inheritance. 1. Contrary to his son's will, a father took possession by right of manumission and obtained a grant of possession of the estate. Later a daughter of the deceased, whom he had

himself disinherited, rightly won an action for undutiful will. The possession which the father received was invalidated; for in the previous hearing the point at issue was the right of the father not the legality of the will, and for this reason, the entire inheritance with its fruits must be made over to the daughter.

17 PAUL, *Questions, book 2:* A person who has not come into court for a prosecution for undutiful will because he intends to withdraw from the case does not make his share available to those who wish to bring the same complaint. Hence, if only one of two disinherited children were to bring an action on a father's undutiful will because, once the will has been invalidated, the other is also entitled to succeed on intestacy; and if he had for this reason wrongly laid claim to the whole inheritance, if he should be successful under these circumstances, he would be able to make use of the support of a previous judgment with the argument that the *centumviri* believed he was the only surviving son at the time when they created intestacy. 1. When judgment is given against a will as being undutiful, the deceased is believed not to have had the power of making a will. The same view should not be accepted if judgment has been given in favor of the party present with no reply from the heir. For in this case, it is not believed that the legal position changes as the result of the judge's verdict, and for this reason, gifts of freedom are due and claims are made for legacies.

18 PAUL, *Undutiful Wills, sole book:* On this matter, a *constitutio* of the deified brothers which allows a distinction of this sort is still in force.

19 PAUL, *Questions, book 2:* A mother on her deathbed appointed an outsider as heir to three quarters of her estate, one daughter as heir to one quarter and passed over the other. The latter successfully brought a complaint of undutiful will. The question is: How should help be given to the daughter in the will? My answer was that the daughter passed over should claim what she was going to have on her mother's intestacy. Now it can be said that if the one left out were successfully to claim the whole inheritance, she might even have the succession entirely to herself, as she would if the other daughter had foregone her statutable inheritance. But we cannot allow her complaint of undutiful will to be accepted to the detriment of her sister. Moreover, it should be stated that she who accepted in accordance with the will is not in a similar position to one foregoing an inheritance. For this reason, half the inheritance should be claimed from the outsider and the justice of taking a whole half should be maintained on the ground that a whole half is the daughter's due. According to this, the will is not broken completely, but the deceased is made intestate only in part, although her last judgment is condemned as that of a lunatic. Furthermore, if anyone thinks that with the daughter's success the whole will is broken, it should be stated that the daughter appointed can still enter into her inheritance on intestacy. For a daughter who has entered in accordance with a will she thinks valid is not considered to be repudiating her statutable inheritance, which indeed she does not know is on offer to her, since even those who do know do not lose their rights when they opt for what they think suitable for them. This happens in the case of a patron who under a false impression has accepted the judgment of the deceased; for it is not considered that he has rejected the idea of being given possession of the estate contrary to the will. From this it is clear that the daughter passed over was wrong to claim the whole inheritance, since, although the will has been broken, the right of the one appointed to enter into her inheritance is still intact.

20 SCAEVOLA, *Questions, book 2:* A person wanting to bring a complaint of undutiful will, although it is alleged he is not a son, ought not to receive possession of the estate under the Carbonian Edict, in order to prevent him from ever being in a better position than if his opponent admits defeat. For this sort of possession ought only to be granted when, if the applicant were really a son, he would be heir or possessor of the estate, so that in the meantime he may be in possession and receive maintenance and may not suffer prejudgment with respect to actions. On the other hand, a person bringing a complaint of undutiful will ought not to initiate actions or pursue any claim except that for his inheritance or to receive maintenance.

21 PAUL, *Replies, book 3:* A person who began a complaint of undutiful will and, because of fraud on the part of the heir in the will, who said he had been asked privately to make over a third of the inheritance to him left off this action is not considered to have abandoned his complaint, and for this reason, he is not prevented from again taking up the action begun. 1. Likewise, the question arose whether one should listen to an heir who, before a complaint of undutiful will is brought, wants payments he made returned to him. He replied that a man who discharged a *fideicommissum*, knowing he was not obliged to, cannot reclaim on this ground. 2. He also replied that after an inheritance has been acquired by means of a complaint of undutiful will from the person who had been appointed heir, the course followed in all matters ought to be exactly the same as if the inheritance had not been accepted, and for this reason, both a fresh claim for a debt and set-off for the debt are available to the appointed heir against the man who defeated him.

22 TRYPHONINUS, *Disputations, book 17:* A son is not prevented from bringing a charge of undutifulness against his mother's will if his father is going to receive a legacy under the will or had accepted the inheritance, in spite of the fact that he is in his power. And I have stated that the father is not prevented from suing in his son's right; for it is the son who is complaining. 1. The question arose: If the father had not succeeded in his action, should what he had received be confiscated? For the gain from his victory goes to someone else, and this case has nothing to do with his performance of his duties as father, but is solely concerned with the desserts of his son. In fact, we should incline to the view that the father does not lose what he received if judgment has been given in favor of the will. 2. Much more is this the case if I was given a legacy by a testator whose son died while bringing an action for undutifulness against his will, leaving me his heir, and I carried on with the inherited case and was beaten. I shall not lose what was left to me under this will, at least not if the deceased had already begun his action. 3. Likewise, if I have adrogated someone who had initiated an action for undutifulness against the will of a person who has given me a legacy, and if I unsuccessfully carry on with the action in the name of my son, I ought not to lose my legacy, because I do not deserve to have what I was left taken from me by the imperial treasury, since I carried on the action not in my own name but by right of a sort of succession.

23 PAUL, *Undutiful Wills, sole book:* Suppose that an emancipated son has been passed over and a grandson by him kept in power and appointed heir. The son is able to claim possession of the estate against his son, the testator's grandson, but he will not be able to bring a complaint of undutiful will. But if the emancipated son has been disinherited, he will be able to bring a complaint, and in this way he will become linked to his son and will acquire the inheritance along with him. 1. If the disinherited have purchased from the appointed heirs the inheritance or single items of it, knowing the vendors to be the heirs, or rented ground or done anything else similar or paid to an heir what was owing to the testator, they are held to accept the judgment of the deceased and are barred from bringing a complaint. 2. If two sons have been disinherited and both have brought an action for undutiful will and one later has decided not to proceed, his share is added to that of the other. It will be the same even if he has been barred because of a time limit.

24 ULPIAN, *Sabinus, book 48:* As regards a complaint of undutiful will, generally the usual thing is for a number of different judgments to be pronounced with respect to one and the same case. What, for example, if a brother was plaintiff and the heirs in the will were of different standing? In such a case, the deceased will be considered to be partly intestate, partly not.

25 ULPIAN, *Disputations, book 2:* If a gift has been made not *mortis causa* but *inter vivos* with however the expectation that it would be considered part of the quarter, it can be said that a complaint of undutiful will is inoperative if the recipient has his quarter in the gift or, if he has less, if the deficiency is made up in accordance with the estimate of a good man; certainly the gift should be counted in. 1. If anyone, though not entitled to bring a complaint of undutiful will, on being allowed to do so, tries to break the will only in part and chooses a single heir against whom to institute a complaint of undutiful will, it should be

said that because the will remains in part valid and persons taking precedence over him have been excluded, he has effectively instituted his complaint.

26 ULPIAN, *Disputations, book 8:* If someone was appointed heir on condition that he manumits Stichus and he manumitted him and after the manumission the will is declared undutiful or unjust, it is only fair for him to be helped by receiving from the person manumitted his value as a slave, so that he does not lose a slave to no purpose.

27 ULPIAN, *Opinions, book 6:* If after proceedings for undutiful will have been instituted the case is settled by agreement and the heir does not honor the settlement, opinion is that an action for undutiful will can be brought afresh. 1. An action for undutiful will is available to the man who asserts that he is the son of a person who in his will denied this but yet disinherited him. 2. A complaint of undutifulness cannot be brought against a soldier's will even by a soldier. 3. A grandson had brought an action for undutiful will for his share against his uncle or some other heir in the will and succeeded, but the heir in the will had appealed. It was decided that in the meantime, because of the lack of means of the *pupillus*, an order should be made for provision of maintenance proportionate to the extent of the assets which were being claimed as his share through the action for undutiful will and that his opponent had to supply him with this until the end of the lawsuit. 4. A son is able to bring a complaint of undutifulness against the will of a mother who, thinking her son had perished, appointed someone else as her heir.

28 PAUL, *Septemviral Court, sole book:* When a mother had heard a false report that her soldier son had died and appointed others as heirs in her will, the deified Hadrian decreed that the inheritance belonged to the son with the qualification that gifts of freedom and legacies should be discharged. This qualification with regard to gifts of freedom and legacies has been criticized; for when a will is proved to be undutiful, no provision under the will holds good.

29 ULPIAN, *Opinions, book 5:* If the legatees have suspected collusion between the heirs in the will and the person bringing an action for undutiful will, it has been laid down that the legatees too should be present in court and safeguard the wishes of the deceased, and these same people are also allowed to appeal if the verdict has gone against the will. 1. Illegitimate sons too can bring an action for undutifulness against their mother's will. 2. In spite of the fact that after proceedings for undutiful will had been instituted, the case was settled by compromise, the legal force of the will still remains unimpaired, and for this reason, gifts of freedom and legacies made under it keep their efficacy as far as the Falcidian share allows. 3. Since a woman cannot adopt a son without an order from the emperor, no one either can bring an action for undutifulness against the will of the person he wrongly thought of as his adoptive mother. 4. An action for undutiful will should be brought in the province in which the heirs in the will have their home.

30 MARCIANUS, *Institutes, book 4:* The natural father has a right to bring an action for undutiful will against the will of a son given for adoption. 1. The deified Severus and Antoninus laid down in rescripts to tutors that they can bring actions for undutiful or forged will in the name of a *pupillus* without endangering what has been given under the will.

31 PAUL, *Septemviral Court, sole book:* If anyone entitled to sue is unwilling or unable to do so, we must consider whether the next in order is entitled to. In fact, it is held that he can, so succession is allowed. 1. As far as a complaint of undutifulness against the will of parents or children is concerned, it does not matter who the heir in the will is whether from the children, outsiders, or fellow townsmen. 2. If I have become heir to a man who has been appointed heir in a will which I want to charge with undutifulness, it will not damage my interests, particularly if I would not gain possession of this part or would do so in my own right. 3. We will express a different

opinion if someone has left me as a legacy the object which he received under the will; for if I accept this, I shall be barred from suing. 4. What, then, if I have registered approval of the testator's wishes in some other way? For example, if, after the death of my father, I have written on the will that I agree to it? I ought to be barred from suing.

32 PAUL, *Undutiful Wills, sole book:* If a disinherited person has acted as advocate or undertaken to act as procurator for someone claiming a legacy under a will, he is forbidden to sue; for he who has shown approval of any sort of judgment of the deceased is considered to have accepted. 1. If someone disinherited has become heir to a legatee and has claimed the legacy, we shall consider whether he should be prevented from bringing this action; for the judgment of the deceased is perfectly clear, and on the other hand, it is true that nothing has been left to him under the will. However, it will be safer if he refrains from claiming the legacy.

3

THE CLAIM FOR AN INHERITANCE

1 GAIUS, *Provincial Edict, book 6:* An inheritance belongs to us by virtue either of the old law or of the new, by virtue of the old law as the result of the statutes of the *Twelve Tables*, or of a will which has been properly made

2 ULPIAN, *Edict, book 15:* (whether we have been made heirs in our own name or through our own actions or through other people,

3 GAIUS, *Provincial Edict, book 6:* for example, if a person in our power has been appointed heir and we have ordered him to accept the inheritance, again, if we have been made heirs to Titius who has become heir to Seius, just as we are able to claim the inheritance from Titius as ours, so we can that from Seius as well) or on intestacy (for example, because we are *sui heredes* to the deceased or agnates or because we have manumitted the deceased or because our father has done so). All who are entitled to an inheritance under *senatus consulta* or *constitutiones* become heirs by virtue of the new law.

4 PAUL, *Edict, book 1:* If I make a claim for an inheritance against a person possessing only a single item, the sole object of the dispute, he will make over also what comes into his possession later.

5 ULPIAN, *Edict, book 14:* The deified Pius said in a rescript that the possessor of an inheritance which was going to be in dispute should be forbidden to dispose of anything from it before the suit is begun, unless he prefers to give security for the whole amount of the inheritance or the handing over of items of it, but after examination of the case, he could do so, in spite of the fact that such security has not been given, just the usual guarantee, even after the commencement of the suit. The praetor has decreed that he will allow expenditure, so that a complete ban on expenditure may not in some circumstances also prevent other advantages. For example, if something is needed for a funeral (for the praetor allows expenditure for a funeral), likewise, if the nonpayment of money before a certain date is going to result in the disposal of a pledge. Furthermore, expenditure will also be necessary on food for the household. Moreover, the praetor ought also to allow the sale of perishables. 1. The deified Hadrian said in a rescript to Trebius Sergianus that Aelius Asiaticus should give security for an inheritance which was being claimed from him and then allege fraud. The reason for this is that the hearing of a claim for an inheritance is postponed while an action for fraud is brought. 2. The status of cases to do with claiming an inheritance is such that nothing should be done implying a ruling on such a case.

6 ULPIAN, *Edict, book 75:* If it is alleged that a will is fraudulent and a legacy is claimed under it, either the legacy should be discharged after security has been furnished or it should be determined whether it is due in spite of the allegation that the will is fraudulent. However, if an inquiry is underway, the legacy should not be given to the person alleging fraud.

7 ULPIAN, *Edict, book 14:* If anyone alleges that freedom is due to him under a will, the judge ought not to give a ruling on the question of freedom in case it prejudges an inquiry into the will, and this was the view of the senate. Furthermore, the deified Trajan said in a rescript that the trial of the question of freedom should be put off until the action for undutiful will is either dismissed or comes to a conclusion. 1. Cases of freedom are only postponed if issue has already been joined in a case of undutiful will. Otherwise, if it is not joined, cases of freedom are not delayed, and this is what the deified Pius said in a rescript. For when a certain Licinnianus was undergoing an inquiry into his status and, to delay the decision on his position, refused to attend the freedom case on the ground that he was about to undertake an action for undutiful will and to claim an inheritance, because he maintained his right to his freedom and the inheritance on the basis of the will, the deified Pius said that if Licinnianus had been in possession of the inheritance, it would have been necessary to be more ready to listen to him, since he would have been going to undertake the case on account of the inheritance, and the decision to bring an action for undutiful will would have rested with the person claiming to be his master. As it was, there ought to be no postponement of the issue of his slavery under the pretext of an action for undutiful will which had not been undertaken by Licinnianus himself over a period of five years. Obviously, he allowed the judge to make a quick estimate of whether possibly the action for undutiful will was being requested in good faith, and, if he found this was so, to prescribe a reasonable amount of time. If issue was not joined within this period, he was to order the judge in the freedom case to do his duty. 2. When anyone is involved in a dispute over freedom and an inheritance but does not allege that he is free on the basis of the will, but that he was manumitted in some other way or by the testator during his lifetime, the deified Pius said in a rescript that the freedom case ought not to be delayed even though the institution of proceedings on the will is expected. He expressly added in his rescript the provision that the judge in the freedom case is to be instructed not to allow any argument in support of freedom based on the will.

8 PAUL, *Edict, book 16:* A person who went along with the judgment of the deceased when unaware of the effects of his will is not forbidden to claim his statutory inheritance.

9 ULPIAN, *Edict, book 15:* The rule should be laid down that a claim for an inheritance lies against a person who has the position of heir or possessor or a thing belonging to the inheritance,

10 GAIUS, *Provincial Edict, book 6:* however small. 1. Therefore, the heir to the whole or a part claims that the inheritance is his either wholly or in part, but the judge's function is to make over to him only what his opponent possesses, either the whole of it, if the heir is heir to the whole inheritance, or a part proportionate to his share of it.

11 ULPIAN, *Edict, book 15:* He who thinks he is heir possesses as heir. But the question arises whether he who knows he is not heir also possesses as heir. In fact,

Arrianus, in the second book of his *Interdicts*, thinks he is liable, and Proculus writes that this is the law today. Certainly, the possessor of the estate (*bonorum possessor*) is also held to possess as heir. 1. On the other hand, possession as possessor is that of the grabber,

12 ULPIAN, *Edict, book 67:* who on being asked why he is in possession, is going to reply, "because I am in possession," and will not maintain that he is heir even by way of a lie,

13 ULPIAN, *Edict, book 15:* and would not be able to give any reason for his possession, and it is for this reason that a claim for an inheritance lies against the thief and robber. 1. This title as possessor is inherent in, and as it were linked to, all other titles. Accordingly, it is even inherent in a title as buyer; for if I have knowingly bought from a lunatic, I possess as possessor. Likewise, in the case of a title as gift, the question arises whether anyone could possess as possessor, for example, a wife or husband. In fact, we support Julian's view that such a person does possess as possessor, and for this reason, a claim for the inheritance will lie against him. Likewise, the title of dowry admits of possession as possessor, for example, if I have married a girl below the age of twelve and in full knowledge received a quasi-dowry. Again, if I have taken a legacy knowing it to be wrongly given, I shall only possess as possessor. 2. A man who makes over an inheritance cannot be liable to a claim for the inheritance, unless he has acted fraudulently, that is, if he makes over in full knowledge; for in a claim for an inheritance, fraud in the past also comes in with the allegation that he gave up possession with fraudulent intent. 3. Neratius writes in the sixth book of his *Parchments* that a claim for an inheritance can be made against an heir, even if he is unaware that the deceased possessed as heir or as possessor. He says in the seventh book that it is the same, even if the heir thought these things were from the inheritance which had been bestowed to him. 4. If anyone has bought an inheritance, should an adapted (*utilis*) claim for the inheritance be given against him to prevent him being harassed by separate lawsuits? For it is certain that the seller is liable; but if the seller is unavailable or sold for only a modest sum and was possessor in good faith, should hands be stretched to the buyer? In fact, Gaius Cassius thinks an *actio utilis* should be given. 5. The same thing should be said also if the heir has sold the inheritance to Titius for a small price in accordance with instructions. For in Papinian's opinion, it should be said that an action is given against the beneficiary under a *fideicommissum*; for there is no point in claiming from the heir who has received only a very small price. 6. Furthermore, the same will have to be paid if he has been asked to make over after keeping a certain amount. Papinian thinks that if the heir has been asked to make over after keeping a certain amount, a claim for the inheritance ought obviously not to be made against him, since he does not possess as heir what he took simply in order to fulfill a provision. But Sabinus on the *statuliber* is of the opposite opinion; and this is more equitable, because the property does belong to the inheritance. 7. The same will have to be said also as regards the man who retains only the fruits of an inheritance; for he too is liable to a claim for the inheritance. 8. If anyone has knowingly bought an inheritance belonging to someone else, in a way he possesses as possessor, and certain people think that this is how the inheritance is claimed from him. I do not think this view is right (for no one who has paid a price is a grabber) but, as the buyer of a whole property, he is liable to an *actio utilis*. 9. Likewise, if anyone has bought an inheritance from the imperial treasury believing it to be unclaimed, the fairest thing will be for an *actio utilis* to be given against him. 10. By Marcellus, in the fourth book of his *Digest*, it is stated that if a woman has given an inheritance as dowry, her husband certainly possesses the inheritance by right of dowry, but is liable to an adapted (*utilis*) claim for the inheritance. Furthermore, Marcellus writes that the woman herself is liable to a straightforward (*directa*) claim, particularly if a divorce has already taken place. 11. It is agreed that an heir is liable to a claim for the inheritance also on account of things which the deceased possessed as buyer on the ground that he possesses as heir, although he is also especially liable on account of the things which the deceased possessed as heir or as possessor. 12. If anyone takes possession of an inheritance in the name of an absentee, in my opinion, even though it is uncertain whether the absentee would give his ratification, the claim for the inheritance should be made in his name, and by no means in the agent's own name, because

it is not considered that a person who takes possession with another in view takes possession either as heir or as possessor, unless perhaps someone says that when the principal does not give his ratification, the agent is then a sort of grabber; for in that case, he can be liable in his own name. 13. It is possible to bring a claim for an inheritance not only against a person who possesses property belonging to it but also if he possesses nothing, and we must consider whether a person is liable if, possessing nothing, he has yet offered a defense against the claim. In fact, Celsus, in the fourth book of his *Digest*, writes that he has made himself liable as the result of fraud; for he acts fraudulently in offering a defense to the claim. Julian gives a general approval to this opinion, saying that anyone who offers a defense to a claim makes himself liable as if in possession. 14. Likewise, anyone who has acted fraudulently to avoid possession will be liable to a claim for an inheritance. But even if someone else has obtained the possession which I fraudulently let go and is prepared to submit to a suit, Marcellus, in the fourth book of his *Digest*, argues that the assessment of damages against the person who has ceased to possess should not automatically be allowed to lapse; and he says it usually lapses if it is not in the interests of the claimant. "Certainly," he says, "if he is prepared to make over the thing, there will be no doubt that it lapses." But even if the man who has relinquished possession with fraudulent intent has already been taken to court, the person in possession will still be liable. 15. Likewise, a claim can be made against a debtor of the estates against one in possession of a right; for it is agreed that this can also be done against the possessors of a right.

14 PAUL, *Edict, book 20:* But it is of no importance whether the debt results from a delict or a contract. The expression "debtor to the inheritance" refers also to the man who has made a promise to a slave of the inheritance or who caused a loss before acceptance of the inheritance

15 GAIUS, *Provincial Edict, book 6:* or stole something belonging to the inheritance.

16 ULPIAN, *Edict, book 15:* But if the debt of the person against whom a claim for an inheritance has been brought is for future or conditional repayment, he ought not to be condemned. Obviously, the time of the matter before the court must be considered according to the view of Octavenus, as cited by Pomponius, that is, whether the appointed day has arrived. This will have to be said also with regard to a conditional stipulation. If it has not arrived, the judge should oblige him to furnish a guarantee of the repayment of this debt when the day has arrived or the condition been fulfilled. 1. Furthermore, he who is in possession of payments made for things belonging to the inheritance and likewise he who has exacted money from a debtor of the inheritance are also liable to a claim for the inheritance. 2. Hence, Julian, in the sixth book of his *Digest*, says a claim for an inheritance can be made against a person who claims the inheritance and has obtained payment of damages. 3. A claim for an inheritance can be made not only against a debtor of the deceased but also against a debtor of the inheritance. Accordingly, both Celsus and Julian are of the opinion that a claim for an inheritance can be made against a person who managed business of the inheritance, but not if the business managed was that of the heir; for a claim for an inheritance cannot be made against the heir's debtor. 4. Julian writes that if a person who was in possession as heir has been forcibly ejected, a claim for the inheritance can be made against him as the possessor of a right because he has an interdict "from which by force," which, if the claim is successful, he should cede, but that the ejector is also liable to a claim for the inheritance because he possesses as possessor property belonging to it. 5. Julian also says that anyone who has sold a thing, whether in possession of it or not, is liable to a claim for the inheritance, whether he has already received the price or is able to claim it, in order that in the latter case too he may be made to cede his rights to sue. 6. Julian further writes that a patron cannot make a claim for an inheritance against a person to whom a freedman has alienated with fraudulent intent, because the latter is liable to an *actio Calvisiana* by him; for the freedman is in debt to the patron, not to the inheritance. Therefore, a claim for an inheritance cannot be made either against one who has received a gift *mortis causa*. 7. Julian again writes that if anyone, because of a *fideicommissum*, has made over an inheritance or conveyed separate items, a claim for the inheritance can be made against him because he can claim by *condictio* things made over on this ground and is, as it were,

possessor of a right. Furthermore, if under a *fideicommissum* he has paid over the prices of things he has disposed of, a claim for the inheritance can be made against him, because he can reclaim. But in these cases he will cede his own rights to sue only when the objects are still in existence and the claimant can still vindicate them by an *actio in rem.*

17 GAIUS, *Provincial Edict, book 6:* If the possessor of an inheritance has discharged legacies from his own resources, because of the fact that he thought himself heir under the will, and if anyone on intestacy wins possession of the inheritance, although the loss is held to fall on the possessor, because he did not safeguard himself by a stipulation that the legacies be returned if the inheritance was lost, yet because it is possible that he discharged the legacies at a time when no dispute had yet arisen and it was because of this that he did not introduce any security, it is considered that in this case he should be given the right to reclaim after being dispossessed of the inheritance. But where the right to reclaim is granted when security is wanting, there is a danger that nothing can be reclaimed on account of the poverty of the person to whom the legacy was made over; and for this reason, in accordance with the view expressed in a *senatus consultum*, he should be given help; he should be allowed to reimburse himself by keeping possession of property belonging to the inheritance, but should cede his rights to sue to the claimant to exercise at his own risk.

18 ULPIAN, *Edict, book 15:* Likewise, we must consider whether, if the possessor of an inheritance has lost money with a banker who conducted a sale for him, he is liable to a claim for the inheritance, since he has nothing and can obtain nothing. But Labeo thinks he is liable, because it was at his own risk that he mistakenly trusted the banker; but Octavenus says he will make over nothing except his rights to sue and that, therefore, it is only on account of these rights that he is liable to a claim for the inheritance. For my part, I support Labeo's opinion as regards the person who possessed in bad faith, but as regards the other case, the possessor in good faith, I think Octavenus's view should be followed. 1. If anyone was the possessor neither of a thing nor, so to speak, of a right when a claim for an inheritance was made against him, but has afterward acquired something, is he liable to a claim for the inheritance? In fact, Celsus, in the fourth book of his *Digest*, is correct when he writes that this man should be condemned, even though to start with he possessed nothing. 2. Now let us consider what comes in a claim for an inheritance. In fact, it is held that everything belonging to the inheritance enters into a case of this sort, whether rights or tangible objects,

19 PAUL, *Edict, book 20:* and not only tangible objects belonging to the inheritance but also ones which do not belong to it but for which the heir is responsible, for example, things given to the deceased as a pledge or lent to or deposited with him. Indeed, there is even a special type of claim for a thing given as a pledge to bring it also within the scope of a claim for an inheritance, just as with those things on whose account the *actio Publiciana* is available. But although no action is ready to hand on account of things which have been lent or deposited, yet because responsibility for them rests with us, it is right for them to be restored. 1. If usucapion as buyer has been completed by the heir, it will not come in a claim for an inheritance, because the heir, that is, the claimant, can vindicate it, and no defense (*exceptio*) is granted to the possessor. 2. Things which the possessor had the right to retain but not also to claim also come within the scope of a claim for an inheritance; for example, if the deceased had sworn that a thing did not belong to the claimant and died, these things too should be handed back. Indeed, if the possessor has lost them by his own fault, he will be liable on this account. The same will also be true in the case of a robber, even if in his case he is not liable for wrongdoing, because he too should not retain these things. 3. I was taught that servitudes did not come into the making over of an inheritance, since there is nothing that can be made over under this heading, as is the case with tangible objects and fruits; but anyone not granting right of way to persons and cattle will be taken to court by means of a special action.

20 ULPIAN, *Edict, book 15:* Likewise, things which have been acquired for the sake of the inheritance are also included in the inheritance, for example, slaves, herd animals, and any other thing it was necessary to acquire for the inheritance. If they were acquired

by means of money belonging to the inheritance, there is obviously no doubt they will be included. On the other hand, if the money did not belong to the inheritance, the case will need consideration. In fact, I think that these too are included if they are of great importance to the inheritance with the heir obviously repaying their cost. 1. But not everything acquired with money belonging to the inheritance comes under a claim for the inheritance. Accordingly, Julian writes in the sixth book of his *Digest* that if the possessor bought a slave with money belonging to the inheritance and a claim for the inheritance is made against him, the slave only comes under the claim if his purchase was in the interests of the inheritance; but if he made the puchase for his own sake, the price alone comes into it. 2. In a similar way too, if he has disposed of land belonging to the inheritance, that is, if he has done it without cause, both the ground and its fruits come into a claim for the inheritance; but if he did it to pay a debt of the inheritance, only the price comes in. 3. Likewise, [Julian goes on] not only things in the inheritance at the time of death but any accretions added to it later come into a claim for the inheritance; for an inheritance admits of both increase and diminution. But, in my opinion, additions, after the inheritance has been accepted, are additions to the inheritance only if they arise from the inheritance itself; if they come from outside, they are not, because they result from the personal position of the possessor. All fruits increase the inheritance whether coming after or before the acceptance of the inheritance. Furthermore, children born to slave girls without doubt increase the inheritance. 4. When we stated that all actions concerning the inheritance come into a claim for it, the question arises whether the actions do so in their existing state or not. Suppose, for example, there is a certain action in which the damages increase as the result of denial of claim. Does the action with the amount added or the action for the simple value come into the claim, as for instance in an action under the *lex Aquilia*? In fact, Julian writes in the sixth book of his *Digest* that the simple value will be the penalty. 5. Julian also rightly says that if in a noxal action the possessor has been condemned in favor of the deceased, it is not possible for him to surrender noxally and be absolved from liability by the action of the judge, because one only has the option of surrendering noxally until taken to court in an action on the judgment; after the action has been taken up, he cannot free himself by surrendering noxally, and he did take it up through his claim for the inheritance. 6. In addition to these points, we have found much other discussion about claiming an inheritance, about the disposal of things belonging to an inheritance, about fraud in the past, and about fruits. Since regulations have been issued on these matters in a *senatus consultum*, it is best to quote the words of the *senatus consultum* and to give an interpretation of it. "On the fourteenth of March the consuls, Q. Julius Balbus and Publius Juventius Celsus Titius Aufidius Oenus Severianus, spoke on decisions which that emperor and mighty prince, the Emperor Hadrianus Augustus Caesar, son of Trajanus Parthicus and grandson of the deified Nerva, published in a note to a petition on the third of March last. On this matter, the following motion was passed. 6a. "Since, before the lapsed shares from the property of Rusticus were claimed for the imperial treasury, those who thought themselves heirs disposed of the inheritance, it is resolved that interest should not be exacted on the money raised as the price of the things sold and that the same practice should be followed in similar cases. 6b. "Likewise, it is resolved that if the decision has gone against those against whom a claim for an inheritance has been made, they are obliged to make over monies which have come to them from the sale of things from the inheritance, even if they had perished or been alienated before the inheritance was claimed. 6c. "Likewise, those who have seized a property though they knew it did not belong to them, even if they have, before joinder of issue, acted to rid themselves of possession, should be condemned just as if they were in possession. On the other hand, those who had good reasons for thinking the property belonged to them are

only to be condemned to pay the amount by which they have been enriched as the result of this. 6d. "It should be considered that an inheritance had been claimed for the imperial treasury from the time when anyone first knew it was being claimed of him, that is, when he had first either been given notice or summoned by letter or edict. The motion was carried." Our task then is to frame an interpretation which fits the individual words of the *senatus consultum.* 7. The senate says: "Since before the lapsed shares were claimed for the imperial treasury." In this instance only shares which had lapsed were being claimed for the imperial treasury but, even if the whole inheritance is involved, the *senatus consultum* will be applicable. It will be the same also if ownerless property is claimed for the imperial treasury or if property has come to it from any other cause whatsoever. 8. This *senatus consultum* will also be applicable if the claim is made for a local authority. 9. No one disputes that the *senatus consultum* is also applicable to claims made by private persons, though it was passed in a case involving the state. 10. We have recourse to the *senatus consultum* not only with regard to inheritance but also with regard to *peculium castrense* or any other aggregate (*universitas*). 11. The words "an inheritance had been claimed, etc." refer to the time from which anyone knows a claim is being made against him; for once he knows, he begins to be a possessor in bad faith, "that is, when he has first been given notice." If then he knows but no one has given him notice, would he begin to owe interest on the money he has raised? In fact, in my opinion he does owe interest; for he begins to be a possessor in bad faith. But let us suppose notice has been given and yet he does not know, because notice has been given not to the man himself but to his procurator. The senate demands that notice be given to the man himself, and for this reason, it will not tell against him, unless the recipient of the notice happens to have informed him, but not if he could have informed him but did not. The senate is not concerned with who has given the notice. Therefore, whoever it was who gave the notice, it will tell against him. 12. Those remarks apply to possessors in good faith; for the senate said: "those who thought themselves heirs." But if anyone made disposals knowing the inheritance did not belong to him, without doubt it is not the value of the things, but the things themselves and their fruits that come under the claim for the inheritance. But the Emperor Severus, in a letter to Celer, appears to have made the position the same for possessors in bad faith as well, and yet the senate spoke of those who think themselves heirs, unless perhaps we are going to apply his words only to things whose disposal was expedient, which were a burden on, rather than a source of profit to, the inheritance, so that the claimant has the option of which sort of reckoning he brings against the possessor in bad faith of the thing itself and its fruits or of its price and of the interest accruing after the commencement of the dispute. 13. Further, although the senate spoke of those who think themselves heirs, yet persons who think themselves possessors of the estate or lawful successors of a different sort or that the inheritance has been made over to them will also be in the same position. 14. Further, Papinian, in the third book of his *Questions*, says that if the possessor of an inheritance does not touch money forming part of the inheritance, he ought in no circumstances to be sued for interest on it. 15. "Money," it said, "raised as the price of things sold." We shall take the word "raised" to refer not only to money already exacted but also to money which could have been exacted but was not. 16. What if he has disposed of things after the claiming of the inheritance? In this case the things themselves will come under the claim. But if their nature happened to be such that they were either sterile or perishable and they have been disposed of at a fair price, perhaps the claimant would be able to choose to receive the money paid for them and the interest on it. 17. The senate says: "It is resolved that if the decision has gone against those against whom a claim for an inheritance had been made, they are obliged to make over the monies which have come to them from the sale of things from the inheritance even if they had perished or been alienated before the inheritance was claimed." If a possessor in good faith has sold things belonging to the inheritance, whether he has exacted payment or not, he will be responsible for the price because he has the right to bring an action; but where he has a right of action, it will be enough for him to hand over

his rights. 18. But if he has sold a thing and, after dispossession of the buyer, given back what he received, the price will be considered not to have come to him, although it could be said that even initially it is not the price which is coming to him because the thing disposed of did not belong to the inheritance; and even though the senate mentioned the disposal of things from the inheritance, not belonging to the inheritance, yet nothing has to be made over because nothing remains with him. For Julian, too, in the sixth book of his *Digest*, writes that he does not have to make over money which he has exacted when it was not owing and that he will not claim a refund of money not owed which he has paid. 19. But if a thing has been returned, in this case at any rate the thing belongs to the inheritance, and yet the price will not enter into a claim, because it has been refunded. 20. Again, if the possessor of the inheritance has entered into an obligation toward the buyer because of the sale, his interests will have to be provided for by guarantee. 21. The possessor will have to make over the value even if the things have been destroyed or alienated. But does he do this only if he is possessor in good faith or even if he is possessor in bad faith? If the things are still with the buyer and have neither been destroyed nor alienated, without doubt the possessor in bad faith has to hand over the things themselves or, if he is completely unable to recover them from the buyer, the value placed on them under oath. But when they have been destroyed and alienated, the true value should be paid on the ground that if the claimant had obtained possession of the thing, he would have disposed of it and not failed to get its true value.

21 GAIUS, *Provincial Edict, book 6:* The word "destroyed" refers to that which has ceased to exist, "alienated" to that which had been usucapted and, because of this, has gone from the inheritance.

22 PAUL, *Edict, book 20:* If the possessor in good faith has both the thing and its price, for example, because he has bought the same thing back, should his wish be granted if he wants to hand over the thing not the price? In the case of the grabber, we say that the plaintiff should have the option. But in the case before us, we must consider whether the possessor should be the one to have his wish granted if he wants to hand over the thing even though it has deteriorated, and not the claimant if he desires the price, on the ground that such a desire is unseemly, or whether, on the other hand, because he has become richer by means of a thing belonging to the inheritance, he should make over also his profit from the transaction. Certainly, in a speech of the deified Hadrian there is this: "You must decide, conscript fathers, whether it is more equitable for the possessor not to make a profit and to pass on the price which he received for a thing belonging to another on the ground that the money from the sale of a thing belonging to the inheritance can be considered to have taken the place of the thing and in a way to have itself become part of the inheritance." The possessor should, therefore, make over to the claimant both the thing and any profit he has made from its sale.

23 ULPIAN, *Edict, book 15:* We must consider whether the possessor in good faith will have to make over the whole price or only if he has become richer. Suppose he has lost, spent, or given away the price he received. Furthermore, the expression "have come" is ambiguous. Did it take into account only the amount at the first reckoning or also the net gain? In fact, in my opinion, although the following part of the *senatus consultum* is ambiguous, it should only be operative if he has become richer. Accordingly, if, through a delay in payment, not only the price has come to him but a penalty as well, it will be possible to say that this should come in, on the ground that he has become richer overall, in spite of the fact that the senate spoke only of the price.

24 PAUL, *Edict, book 20:* But where he has been forcibly evicted, he is not obliged to make over the penalty incurred as the result of this because his opponent is unable to get it. So too there is no obligation to make over a penalty which his opponent promised him if he did not come to court.

25 ULPIAN, *Edict, book 15:* Again, the same will need to be said if he has made a sale with a forfeit clause, that is, he will hand over the gain he received as a forfeit. 1. Likewise, if he has disposed of a thing and bought another thing with the price, the price

will come into the claim for the inheritance, not the thing which he has made part of his own estate. But if the thing is worth less than it was bought for, he will be deemed to have become richer only to the extent of the thing's value, just as, if he spent the money, he will not be deemed to have become richer at all. 2. The senate says: "Those who have seized a property, though they knew it did not belong to them, even if they have, before joinder of issue, acted to rid themselves of possession, should be condemned just as if they were in possession." This must be understood to mean that past fraud too is to be brought into a claim for an inheritance and so is negligence and that it is for this reason that a claim for an inheritance can be made against one who has not exacted payment from someone else or from himself, if he has been freed from his obligation by lapse of time, at any rate, if he was in a position to exact it. 3. When the senate speaks of "those who have seized a property," it refers to grabbers, that is, to those who, although they knew an inheritance did not belong to them, seized the property when obviously they had no good reason for possession. 4. Furthermore, it says they will be liable not for the fruits which they have collected, but for those they ought to have collected. 5. The senate is speaking of one who seizes things belonging to an inheritance with, from the beginning, the attitude of a grabber. It is considered that the senate is not speaking about the case where a person initially had a good reason for acquiring possession, but later, becoming aware that the inheritance does not belong to him, begins to behave like a grabber. However, in my opinion, the intention of the *senatus consultum* is relevant to this case also; for it matters little whether anyone has behaved fraudulently from the beginning in the matter of an inheritance or begins to do so later. 6. Is it only the man who knows his position who is considered to know an inheritance does not belong to him, or also the man who has made a mistake as regards the law? For example, he thought a will was properly drawn up when it was invalid or that the inheritance came to him when another agnate took precedence over him. In fact, in my opinion, the man without fraudulent intent is not a grabber, even though he is mistaken as regards the law. 7. "If before joinder of issue," it says, "he has acted." The reason why this qualification has been added is that after joinder of issue all begin to be possessors in bad faith or rather after the beginning of the dispute. For although the *senatus consultum* mentions joinder of issue, yet even after the beginning of the dispute all possessors become on an equal footing and are liable as grabbers. This is the law today; for a man who is sued begins to realize he is in possession of a thing not belonging to him. On the other hand, the man who is a grabber, will be liable for fraud even before joinder of issue; for in his case there is fraud in the past. 8. "They should be condemned," it says, "just as if they were in possession." Rightly so, for he who has with fraudulent intent acted to rid himself of possession is condemned as possessor. You will take this to apply whether he has given up possession with fraudulent intent or whether he has refused to accept possession with fraudulent intent. Moreover, this clause will apply whether the thing is in the possession of someone else or has been completely destroyed. Hence, if someone else is the possessor, a claim for the inheritance can be made against both of them and, if possession has passed through many hands, all will be liable. 9. Will the person in possession alone be liable for the fruits or also the one who with fraudulent intent acted to rid himself of possession? In fact, following the *senatus consultum*, it will have to be said that both are liable. 10. These words of the *senatus consultum* mean an oath is used even against one not in possession; for an assessment of damages on oath is made against one who with fraudulent intent acted to rid himself of possession, as well as against the one in possession. 11. The senate took thought for the interests of possessors in good faith; they are not to suffer an overall loss but are to be liable only to the extent they have become richer. Therefore, while they are under the

impression it is their own property they are misusing, they will not be liable for any loss they have put the inheritance to if they have caused the deterioration or loss of anything; and if they have made a gift, they will not be deemed to have become richer in spite of the fact that they have put someone under a moral obligation to make a return-gift. Obviously, if they have received return-gifts, it must be said that they have been made richer to the extent of what they have received on the ground that this would be a sort of barter. 12. If anyone has been too free with his own property in the expectation of an inheritance coming to him, Marcellus, in the fifth book of his *Digest*, is of the opinion that he will get nothing from the inheritance if he has not laid hold of it. 13. In a similar way too, if he took a loan, he would have made the mistake of thinking himself rich. 14. If, however, he has given things belonging to the inheritance as a pledge, we must consider whether this constitutes laying hold of the inheritance. The question is difficult since he personally has incurred the legal obligation. 15. So strong is the principle that a person not enriched is not liable that Marcellus, in the fourth book of his *Digest*, discusses whether anyone who, believing himself heir to the whole, consumes half an inheritance without fraudulent intent, is not liable on the ground that what he expended was from what belonged not to him but to his fellow heirs. For even if one who was not heir used up the whole of what was in his possession, he is without any doubt not liable on the ground that he has not become richer. But in the problem before us, after three possibilities have been set out, the first one, then a second that it can be said that he ought to make over the whole of what is left on the ground that he has used up his own share, and a third that what has been used up is subtracted from the share of each, Marcellus says that something certainly should be made over, but is doubtful whether to say the whole or a part should be made over. However, in my opinion, the whole of the remainder should not be made over but only a half of it. 16. Should the whole of what anyone has expended from an inheritance be deducted or a part proportionate to his share of the estate? For example, suppose he consumes all the drink belonging to the inheritance. Should the whole of this be made a charge on the inheritance or some too on his share of the estate? He would appear to be richer from the point of view of what he used to expend himself before the inheritance came to him, but if he spent more freely with the inheritance in mind, from this point of view he would not appear to have become richer, although from the point of view of his ordinary expenses he would appear to have become richer; for obviously even if he would not have spent so freely, he would still have spent something for his daily needs. Certainly, the deified Marcus, in the case of Pythodorus who had been asked to make over what he had left out of an inheritance, decreed that things which had been alienated, not in discharge of a *fideicommissum* and without their price becoming part of Pythodorus's estate, be deducted both from Pythodorus's own estate and from the inheritance, not just from the inheritance. Now, therefore, we shall still have to consider whether normal expenses should be deducted from the inheritance on the lines of the rescript of the deified Marcus or only from his personal estate. In fact, it is fairer that what he would have expended, even if he had not been heir, should come from his estate. 17. Again, if the possessor in good faith has disposed of a thing and not been made richer by its price, could the claimant vindicate individual objects from the buyer if they have not yet been usucapted? And if he vindicates, would he escape being barred by the defense "insofar as the question of the inheritance between the plaintiff and the seller be not prejudged," because the price of the things does not appear to come under the claim for the inheritance. Yet if the buyers are defeated, they are going to turn to the man who sold them the things. In fact, my opinion is that the things can be vindicated if the buyers cannot go back and sue the possessor in good faith. But what if the seller in his defense of the inheritance

is prepared to be taken to court just as if it was his possession? A defense (*exceptio*) begins to be available on the side of the buyers. Certainly, if the things have been sold for too small a price and the plaintiff has got hold of that price, whatever it was, there will be much more reason for saying that he is barred by a defense. Certainly, Julian, in the fourth book of his *Digest*, writes that if the possessor pays to the claimant of an inheritance what he has exacted from debtors, the debtors are released from their liabilities, whether he was a possessor in good faith or a grabber, and they are released automatically. 18. A claim for an inheritance, even though it is an action for a thing (*actio in rem*), still covers certain personal obligations to pay, for example, money exacted from debtors and for things sold. 19. It is held that this *senatus consultum*, which was passed with regard to a claim for an inheritance, is also applicable for an action for dividing an estate, to prevent the absurd situation that what can be claimed cannot be divided. 20. An inheritance is increased by the young of flocks and herds.

26 PAUL, *Edict, book 20:* And if sheep have been born and then others from these, the latter too have to be made over as an increment.

27 ULPIAN, *Edict, book 15:* The children of slave-girls also and the children of their children, though not thought of as fruits because slave-girls are not acquired solely as breeding stock, are still additions to an inheritance. Since all these become part of the inheritance, there is no doubt that the possessor, if he is either in possession or, after a claim for the inheritance, has with fraudulent intent acted so as to rid himself of possession, is obliged to make them over. 1. Again, rents received from the lettings of urban property will come under the claim, even if they have been received from a brothel. For brothels are run even on the property of many respectable men.

28 PAUL, *Edict, book 20:* For following the *senatus consultum*, we must say that all gain has to be taken from the possessor in good faith as well as from the grabber.

29 ULPIAN, *Edict, book 15:* Obviously, rents received from farmers are classed as fruits. The services of slaves too will be in the same position as are rents, and likewise the transport charges of ships and beasts of burden.

30 PAUL, *Edict, book 20:* Julian writes that a plaintiff is obliged to choose whether he wishes to receive the principal only or also the interest together with the risk of the debts. But on this view we shall not be observing the senate's intention that a possessor in good faith is liable only to the extent of his enrichment. For what if the plaintiff opts for money which is not available? We must say, therefore, in the case of the possessor in good faith, that he ought to be liable only for this, namely either the principal and the interest on it, if he has collected the interest too, or the making and surrender of debts to cover the sum still owing from them, of course, at the claimant's risk.

31 ULPIAN, *Edict, book 15:* If a possessor makes any payment to creditors, he will charge it, although in strict law he has not freed the claimant of the inheritance from his liability; for a payment by anyone in his own name, not that of the debtor, does not free the debtor. It is for this reason that Julian, in the sixth book of his *Digest*, writes that the possessor will only charge this if he has given a guarantee that he will defend the claimant. But we will have to consider whether the possessor in good faith is also obliged to guarantee defense because in respect of the payment he does not appear to have become richer, unless perhaps he has the right of *condictio* and is considered richer on account of this power to reclaim; for suppose that while under the impression he is heir, he has paid in his own name. In fact, I think Julian's view on the need to give a guarantee applies only to the grabber, not to the possessor in good faith as well. However, he will have to hand over his right of *condictio*. Furthermore, the claimant will have the right to make use of a defense (*exceptio*) if he is taken to court by the creditors. 1. But if something was owed to the grabber himself, he will not have the right to deduct this, particularly if the debt was based on a moral obligation. What, however, if the payment of the debt was in the interests of the claimant on account of

a penalty or some other reason? It can be said that the grabber either did make or should have made the payment to himself. 2. The justified possessor without any doubt will have the right to deduct what is owing to him. 3. But just as he deducts any expenditure, so, if he should have spent money but did not, he should be accountable for this negligence unless he is a possessor in good faith; for in that case because he has, so to speak, neglected his own property, he is not exposed to any complaint before a claim is made for the inheritance, whereas afterward he too is in the position of a grabber. 4. It is obviously impossible to charge a grabber with allowing debtors to escape from their legal obligations and to become poorer and with not taking them to court, since he did not have the right to sue. 5. Let us see whether a possessor should make over what has been paid to him. In fact, it is held that whether he was a possessor in good faith or not, he should do so, and that if he has done so, as Cassius writes and Julian too in his sixth book, the debtors are automatically freed from their liabilities.

32 PAUL, *Edict, book 20:* Things acquired through a slave must be made over to the heir. This occurs in the case of the inheritance of a freedman and when there is an action for undutiful will, since the slave would, in the meanwhile, be in the bonitary ownership of the heir,

33 ULPIAN, *Edict, book 15:* unless he has exacted a stipulation against the property of the heir in the will. 1. Julian writes that where the possessor has disposed of a slave, if he was not essential to the inheritance, he will, in a claim for the inheritance, hand over his price (for he would be blamed if he had not disposed of him); but if the man was essential to the inheritance, if he is alive, the slave himself must be handed over, if he has died, perhaps not even the price. But he writes that the judge who hears the case will not allow the possessor to make a profit from the price, and this is the fairer view.

34 PAUL, *Edict, book 20:* In my opinion, a claim can be made for an inheritance coming to us by will from a son-in-power who was a soldier. 1. If a slave or son-in-power holds things belonging to an inheritance, a claim for the inheritance can be made against the father or master if he has the power to make the things over. Certainly, if he has the money from the sale of things belonging to the inheritance in the *peculium* of his slave, Julian too thinks a claim for the inheritance can be made against the master as against the possessor of a right.

35 GAIUS, *Provincial Edict, book 6:* Julian also says that even if the slave has not yet obtained the prices of the things, a claim for the inheritance can be made against his master as against the possessor of a right, because he has an action available by which to obtain the money. The right to the action would be acquired even by one in ignorance.

36 PAUL, *Edict, book 20:* If a claim for an inheritance is made against a master or a father in possession of money from sales, must the action be brought within a year if the son or slave has died or the slave been manumitted or the son emancipated? And can the master or father deduct a debt to himself? Julian says it is fairer—and this was also Proculus's reply—for an action to be allowed without a time limit, and that the debt to the father should not be subtracted, because this is not an action on *peculium* but a claim for an inheritance. This is correct if the slave or son-in-power has money from sales. But if the reason for the claim for the inheritance against the master is that the slave was a debtor, the situation will have to be considered the same as if an action for *peculium* were being brought. Mauricianus says that the same should be said even if the slave or son has spent the money received from sales, but payment can be made from his *peculium* in some other way. 1. But there is no doubt that a claim for an inheritance can also be made against a son-in-power because he has the power to make over, just as he has it for production. Much more do we assert that a claim for an inheritance can be brought against a son-in-power who, when he was head of a household and in possession of an inheritance, had himself arrogated. 2. If the possessor has killed a slave belonging to the inheritance, this too will come up in a

claim for the inheritance; but Pomponius says the plaintiff must choose whether he wants him condemned on condition that he gives a guarantee that he will not take proceedings under the *lex Aquilia*, or whether he prefers the judge to omit an assessment of damages and to leave open to him an action under the *lex Aquilia*. This choice is pertinent if the killing of the slave took place before the inheritance was accepted; for if it took place later, it has its own special action and will not come under a claim for the inheritance. 3. If a grabber had given up possession with fraudulent intent and a thing has perished as it was going to perish even if the situation as regards possession had remained the same, as far as the words of the *senatus consultum* go, the position of the grabber is better than that of the possessor in good faith, because the grabber, if he has given up possession with fraudulent intent, is condemned just as if he were in possession, without any reference to the destruction of the thing. But there is no doubt that he ought not to be in a better position than the possessor in good faith. That is also the reason why, if a thing has been sold for more than its value, the plaintiff will have to be given the option of taking the price; otherwise, the grabber may make a profit. 4. There is some doubt about what date should be taken for assessing the enrichment of the possessor in good faith, but the better opinion is that the relevant time is that of the judgment. 5. Fruits are reckoned after the subtraction of expenses incurred in finding, collecting, and storing them. Natural justice demands this not only in the case of possessors in good faith but also in that of grabbers. This was also the opinion of Sabinus.

37 ULPIAN, *Edict, book 15:* And if he has been put to some expense and not succeeded in gathering any fruits, it will be fairest to take account of this too in the case of possessors in good faith.

38 PAUL, *Edict, book 20:* Obviously, they can be treated differently with regard to all other essential and useful expenditure, so the possessors in good faith would put this too on the account, while the grabber would have himself to blame for knowingly spending money on another's property. But it is kinder in the latter's case too to take his expenditure into account (for the claimant ought not to profit from another's outlay) and this will of itself form part of the judge's duty; for not even the defense of fraud is required. Obviously, there can be a difference in this respect, that the possessor in good faith deducts his expenses without exception, even if the object of his expenditure no longer exists, just as the tutor or curator is allowed to, whereas the grabber only does so if an improvement has been effected.

39 GAIUS, *Provincial Edict, book 6:* Useful and essential expenses are, for example, those for repairing buildings or on nursery gardens or when damages are paid on behalf of slaves because this is more expedient than surrendering the slaves themselves. To be brief, it is clear that there are many other expenses of the same kind. 1. However, with regard to other expenses, for pictures, statues, and all other ornamental objects, the defense of fraud may be just as helpful to us, provided that we are possessors in good faith. For a grabber will rightly be told that he should not have incurred unnecessary expenditure upon someone else's property, though he should be given the chance of removing what can be removed without damage to the property itself.

40 PAUL, *Edict, book 20:* The following principle too, which occurs in a speech of the deified Hadrian, is sometimes harsh, that after acceptance of suit, the plaintiff is given what he would have had if the inheritance had been made over to him at the time of making his claim. For what if after joinder of issue slaves or working or herd animals have died? According to the wording of the speech, payment for them will have to be imposed because the claimant could have disposed of them if the inheritance had been made over. Proculus held that this was just in particular cases, whereas Cassius took the opposite view. As regards the grabber, Proculus is right; as regards possessors in good faith, Cassius. For the possessor ought not to have to guarantee against death or, through fear of this, to have to let his case go undefended without good cause. 1. The

grabber does not make the fruits his own, but they form an addition to the inheritance, and for this reason, he will hand over their fruits as well. In the case of the possessor in good faith, only those fruits which have made him richer come up in the transference. 2. If the possessor has acquired any rights of action, he has to make them over when dispossessed of the inheritance, for example, if he has acquired an interdict against violence or an interdict on *precarium*. 3. On the other hand, if the possessor has given a guarantee against the risk of loss (*damni infecti*), a guarantee must be given to the possessor. 4. Noxal actions too will be a concern of the judge, so that if the possessor is prepared to surrender noxally a slave who has caused damage or committed a theft with respect to property belonging to the inheritance, he is freed of liability, just as happens in the case of an interdict against violence or stealth.

41 GAIUS, *Provincial Edict, book 6:* If the possessor of an inheritance was in possession of a smaller number of things at the time proceedings were being brought against him and later took possession of other things as well, these too he will have to make over on defeat whether he obtained possession before acceptance of suit or afterward. And if the givers of verbal guarantees whom he produced prove insufficient for the action, it will be the duty of the proconsul to order him to provide suitable security. On the other hand, if he is afterward in possession of a smaller number of things than he was in the beginning, provided this is not the result of fraud on his part, he should be freed of liability for the things he has ceased to possess. 1. Julian says that the fruits of the things which the deceased accepted as a pledge should also be taken into account.

42 ULPIAN, *Edict, book 67:* If a debtor of an inheritance refuses to pay not because he says he is heir, but because he denies or is in doubt whether the inheritance belongs to the person claiming the inheritance, a claim for the inheritance cannot be brought against him.

43 PAUL, *Plautius, book 2:* After I have accepted a legacy from you, I make a claim for the inheritance. Atilicinus says that certain people were of the opinion that I should only be allowed to bring the claim if I were to return the legacy. Possibly, however, the claimant of the inheritance should only have to hand back the legacy if he is given a guarantee of the legacy being returned to him should the decision on the inheritance go against him, since it would be inequitable under these circumstances for the possessor of the inheritance to keep a legacy he has handed over and particularly if his opponent's claim for the inheritance was not vexatious but erroneous. Laelius too supports this view. The Emperor Antoninus said in a rescript that a person who had taken a legacy under a will should, after examination of the case, be refused permission to bring a claim for the inheritance, obviously if the vexatious nature of his claim is clear.

44 JAVOLENUS, *From Plautius, book 1:* When a person who has received a legacy under a will makes a claim for the inheritance, if the legacy was for any reason not returned, it is part of the judge's duty to deduct what the successful claimant has received when the inheritance is made over.

45 CELSUS, *Digest, book 4:* A person who has submitted himself to a lawsuit when he was not in possession of a thing, is condemned, unless he can show by the clearest proofs that the plaintiff from the beginning of the lawsuit knew he did not have possession. For in that case he has not been deceived and the person who submitted himself to the claim for the inheritance is subject to the clause against fraud. Obviously, an assessment will have to be made of how much it was in his interest not to be deceived.

46 MODESTINUS, *Distinctions, book 6:* A person who has given a private undertaking to make over an inheritance to one not taking it should be considered to be in the position of a grabber.

47 MODESTINUS, *Replies, book 8:* When Lucius Titius has been unsuccessful in prosecuting a kinsman on a charge of forging a will, I want to know whether a complaint that the will was not properly made or sealed could be available to him. He replied that the fact that he had been unsuccessful in his prosecution for forgery did not prevent him from suing on the ground that the will had not been properly made.

48 JAVOLENUS, *From Cassius, book 3:* In valuing inheritances, to the price at which the inheritance was sold is added also anything more that was in the inheritance if it was sold in the way of business, but if in accordance with a *fideicommissum*, only what he accepted in good faith.

49 PAPINIAN, *Questions, book 3:* If the possessor in good faith of an inheritance wants to sue debtors of the inheritance or those who have seized things belonging to it, he will not be refused a hearing, at any rate if there will be a danger of the actions lapsing amid delays. On the other hand, a claimant of an inheritance will be able to bring an action for a thing without fear of a defense (*exceptio*). For what if the possessor of the inheritance should be negligent? What if he knows he has no right?

50 PAPINIAN, *Questions, book 6:* Even where an inheritance has no material content, the term can have the meaning of "rights." 1. If a possessor in good faith has built a monument to the deceased in order to fulfill a provision, it can be said, because the wishes of the deceased should be observed even in this, at any rate if the expense of building the monument does not exceed an acceptable amount or the testator's instructions, that the person from whom the inheritance is being taken will reasonably by means of a defense against fraud either keep back his expenses or reclaim them by an action for unauthorized administration on the ground that he had transacted business to do with the inheritance. For although in strict law there is no action to make heirs build a monument, yet they are compelled by the authority of the emperor or the priests to comply with last wishes.

51 PAPINIAN, *Replies, book 2:* The heir of a lunatic will hand over to the lunatic's substitute or nearest cognate the intervening period's fruits, by which it is considered that the lunatic has been made richer through the agency of his curator, with the deduction, of course, of necessary or useful expenditure on the same property. Furthermore, any necessary expenditure on the lunatic should also be deducted, unless the lunatic has other property sufficient for his maintenance. 1. Interest is not paid on fruits collected after a claim for an inheritance has been made. The position is different of those which were collected before an action for the inheritance was brought and formed an addition to the inheritance.

52 HERMOGENIAN, *Epitome of Law, book 2:* If a possessor has had improper gains from an inheritance, he will be compelled to hand over these as well, so that a proper interpretation does not result in improper gains for the possessor.

53 PAUL, *Sabinus, book 10:* The power to transfer ownership is essential to the possessor, not only for paying debts of the inheritance but also if there has been essential expenditure on things belonging to the inheritance by the possessor or if there would have been loss or deterioration from delay.

54 JULIAN, *Digest, book 6:* It is not unjust for one who has purchased all or part of an inheritance from the imperial treasury to be granted an action by which he sues for the entire property, just as a claim for the inheritance is granted to a person to whom an inheritance has been made over in accordance with the *senatus consultum Trebellianum.* 1. There is no doubt that the heir of a debtor can, by a claim for his inheritance, obtain what the deceased had given as a pledge. 2. When real estate in town or country had deteriorated owing to neglect on the part of the possessors, for example, because vineyards, orchards, and gardens have not been cultivated in accordance with the practice of the deceased head of household, the possessors should be subjected to an assessment of damages for the amount of the deterioration.

55 JULIAN, *Digest, book 60:* A possessor in good faith dispossessed of an inheritance will make over not just damages, but the double damages he had won under the *lex Aquilia.* For he ought not to make a profit from what he has received because of the inheritance.

56 AFRICANUS, *Questions, book 4:* When a claim for an inheritance has been made, the fruits which the possessor has gathered should be made over in all circumstances, even if the claimant would not have collected them.

57 NERATIUS, *Parchments, book 7:* In a case where the same man is defending the same inheritance against two people, and a verdict has been given in favor of one of them, it is often asked whether the inheritance ought to be made over to him in the same way as it ought to be if it were not being defended against the other person, with the result, of course, that if a verdict is then given in favor of the other as well, the defendant would be free of liability on the ground that he is not in possession and has not acted with fraudulent intent to rid himself of possession, because he made the transfer after being defeated in a lawsuit. Or, because of the possibility of a verdict in favor of the other man as well, ought he to make the transfer only after obtaining a guarantee on the ground that he is defending the same inheritance against another person? But it is better for the judge to use his position to furnish the loser with the remedy of a guarantee or security, since the property would also be safeguarded for the man suing later in relation to the earlier winner.

58 SCAEVOLA, *Digest, book 3:* A son emancipated by his father in accordance with a provision in his mother's will accepted the inheritance. The father had been in possession of it before emancipating the son and had been in possession of fruits from it, but had made some outlay from it for his son's advancement, since he was a senator. The question that has been asked is: Since the father is prepared to make over the inheritance after taking into account what he has spent on him, can the son be barred by the defense against fraud if he persists nevertheless in bringing a claim for the inheritance? My reply was that even without the defense, the judge's powers are an adequate safeguard.

4

CLAIMS FOR PART OF AN INHERITANCE

1 ULPIAN, *Edict, book 5:* After the action which the praetor made available to the person maintaining that an inheritance belonged to him alone, it would have been inconsistent not to make one available also to the person claiming only a part of an inheritance. 1. He who claims an inheritance or part of an inheritance does not regulate his claim by what the possessor holds but by his own rights. For this reason, if he is heir to the whole, he will claim the whole inheritance, even though you possess only one thing, whereas if only to a part, only a part, even though you possess the whole inheritance. 2. Indeed, if two people are in possession of an inheritance and there are two who allege a part belongs to each of them, they should not be content each to claim only from one, for example, the first from the first or the second from the second, but both from the first and both from the second. For one is not in possession of the first's part and the other of the second's, but both as heir of that of each. And if a possessor and claimant are in possession of an inheritance where each of them demands half the inheritance for himself, they will have to claim against each other in order to obtain their shares of the property. Or if they do not enter into a dispute with each other over the inheritance, they should go to court with an action for dividing the inheritance. 3. If I say I am heir only to a part and my co-heir is in possession of the inheritance together with an outsider, since my co-heir does not have more than his share, the question is whether I ought to make a claim for the inheritance only against the outsider or, on the other hand, also against my co-heir. It is said that Pegasus thought I ought to make my claim only against the outsider and that he will hand over whatever he is in possession of, and perhaps it should be the judge's function to ensure this happens. However, logic suggests that I bring my claim against both, that is, against my co-heir as well, and that he should also bring an action against the outsider in possession. But Pegasus's view is more practical. 4. Let us also consider what sort

of action I should bring if, when I say I am heir to a half but possess only a third of the inheritance, I want to sue for the remaining sixth. Labeo writes that I ought certainly to claim my half share from each separately, so that the result of this will be that I obtain a sixth from each and I shall have two thirds. This, I think, is right, but I myself will be liable to hand over one sixth from the third in my possession. For this reason, if those against whom I make my claim for the inheritance happen to be co-heirs, the judge should use his position to make an adjustment between us of what I possess. 5. Sometimes, when suitable reasons are given, the praetor allows a claim for an unspecified part of an inheritance. For example, suppose there is a son of a deceased brother and that there are also pregnant wives of deceased brothers. What share of the inheritance the son of the brother should vindicate is uncertain, because it is uncertain how many sons may be born to the brothers of the deceased man. The fairest thing, therefore, is for him to be allowed to vindicate an unspecified share. It will not, therefore, be rash to say that whenever anyone is with good reason not sure what share to vindicate, he ought to be allowed to vindicate an unspecified share.

2 GAIUS, *Provincial Edict, book 6:* Where, out of a number of people with an interest in the same inheritance, some have accepted while others are still considering it, if the acceptors make a claim for the inheritance, they ought not to claim a larger share than they would have if the others accepted; and it will do them no good if the others end up by not accepting. But if the others do not accept, they will then be able to claim their shares, provided that they have an interest in them.

3 PAUL, *Plautius, book 17:* The ancients looked to the interests of a free, unborn child by keeping all his rights intact until the time of his birth, as is clear from the law of inheritance. Agnates of a degree remoter than that of the child in the womb are not admitted to an inheritance while there is uncertainty about the possibility of his birth. When the rest are of the same degree as the child in the womb, the question they then asked was: What share ought to be kept in suspense? The reason for the question being that they could not know how many children may be born. For on a matter of this sort, there are many beliefs so different and incredible that they should be classed as fiction. There is a story of as many as four girls being born to a matron at the same time. Again, good authorities have reported that in the Peloponnese a woman five times produced quadruplets, and that many women in Egypt have produced seven children at one birth. Furthermore, we have seen triplets in senatorial garb, the Horatii. Furthermore Laelius writes that he saw on the Palatine a free woman, brought from Alexandria to be shown to Hadrian, with five children, of whom, he said, it was reported that she had produced four at the same time and the fifth forty days later. What then is the position? Very wisely legal authorities have followed a sort of middle course and disregarded what can only be an extremely rare occurrence—that is, because the birth of triplets is a possibility, they allotted only a quarter share to the surviving son; for, as Theophrastus says, legislators disregard what happens only once or twice. For this reason, even if she is destined to give birth to only one child, the surviving son will, in the meantime, be heir not to a half but to a quarter,

4 ULPIAN, *Edict, book 15:* and if fewer are born, the remainder accrues to him in proportion to his share; if more than three, there is a decrease in the share he was made heir to.

5 PAUL, *Plautius, book 17:* It must be noted that if a woman is not pregnant but is thought to be pregnant, the son is, in the meantime, heir to the whole, even if he is unaware he is heir to the whole. 1. It is the same in the case of an outsider, if he has been appointed heir to a specified share and posthumous children to the rest. But if, say, he has been appointed heir in the following terms, "let Lucius Titius and as many children as will be born to me be my heirs with equal shares," he will be in doubt whether he can accept, like a man who does not know his share in a will. But it is better for a man who does not know his share to be able to accept if he does know everything else he ought to know.

6 ULPIAN, *Opinions, book 6:* To a sister who, it has been decided, is co-heir with four brothers to her mother's property will go a fifth share which belonged to them taken proportionately, so that each individually gives her not more than a fifth of the quarter which was previously believed to be his. 1. Expenses which are justifiably incurred because of burdens on the inheritance as a whole are charged, in proportion to his share, to the person who has secured possession of a part because of his rights as patron.

7 JULIAN, *Digest, book 8:* We cannot attain through a claim for an inheritance what we attain by an action for dividing an estate, namely getting away from mutual participation, since the business of the judge is only to order a share of the inheritance to be made over to me without division.

8 JULIAN, *Digest, book 48:* The possessor of an inheritance will have to be allowed to maintain his right to one part of the inheritance but to surrender another; for the fact that someone possesses the whole of an inheritance and yet knows only half belongs to him does not prevent him from not disputing the other half.

9 PAUL, *Epitome of the Digest of Alfenus, book 3:* In a case where many heirs had been appointed, one of them was in the province of Asia. His procurator held a sale and had taken money from it in accordance with his principal's share. Afterward it would appear the man in the province of Asia had died before this, after appointing his procurator as heir to one half of his estate and someone else to the other half. The question raised was how ought the money from the inheritance to be claimed. The reply was that they ought to make a claim for the whole inheritance against the man who had been his procurator, because the money which had come to the procurator from the sale had been from the estate, and as well as this a claim for half the inheritance against his co-heirs. The result of this would be that if all the money was in the possession of the man who had been procurator, they would recover all of it from the one man through the agency of the judge, while if he had given a half share to his co-heir, they would secure the condemnation of the procurator himself for a half share and his co-heirs for a half share.

10 PAPINIAN, *Questions, book 6:* A father had been appointed heir in part. His son, who was unaware that his father had passed away during the testator's lifetime, managed part of the inheritance in his absent father's name and received sums of money for things disposed of. A claim for the inheritance cannot be made against the son because he does not possess the money as heir or as possessor, but conducted the business as the son of his father. However, an action for unauthorized administration will be granted to the rest of the co-heirs to whom the share of the deceased belongs. For there is no need at all to fear that he may be liable to the heirs of his father by

whom, as it happened, he was disinherited on the ground that he administered business of the inheritance, since the business he managed was not to do with his father's inheritance. For although there is an action for unauthorized administration available to the person in whose name an acquisition has been made, it is right for it to be made over to the person in whose name it was made. But in the case before us the transactions concerned neither the father, who had ceased to exist, nor the father's successors, who were concerned with a different inheritance. But if the son referred to was recognized as his father's heir and raises a dispute on the ground that his father met his death after becoming heir, this question crops up, whether it should be considered that he changes the basis of his own possession. However, since a person who has transacted business of an inheritance and become its debtor can still be sued as the possessor of a right if he afterward disputes the inheritance, the same reply will also have to be given with regard to the son in this case.

5

POSSESSORY CLAIMS FOR AN INHERITANCE

1 ULPIAN, *Edict, book 15:* It was normal for the praetor, after setting out the actions available to heirs under the civil law, to take thought also for those he himself, as it were, makes heirs, that is, for those to whom possession of an estate is granted.

2 GAIUS, *Provincial Edict, book 6:* By this mode of claiming an inheritance the possessor of an estate gets as much as an heir can get by means of the above civil law actions.

6

CLAIMS FOR AN INHERITANCE BASED ON A *FIDEICOMMISSUM*

1 ULPIAN, *Edict, book 16:* Next comes the action made available to those to whom an inheritance has been made over. For whoever has taken up an inheritance made over to him in accordance with the *senatus consultum* under which actions pass to him will be able to make use of a claim for an inheritance based on a *fideicommissum,*

2 PAUL, *Edict, book 20:* an action which has the same scope as the civil law claim for an inheritance.

3 ULPIAN, *Edict, book 16:* And it does not matter whether anyone has been asked to make a transfer to me, or to the man whose heir I have become. Indeed, even if I am possessor of the estate in relation to the man who was left the inheritance under a *fideicommissum* or succeeded him in some other way, I will still be able to bring this action. 1. It should be noted that this action is not available against the person who made over the inheritance. 2. I am given the actions which are available to and against an heir.

BOOK SIX

1

VINDICATIO OF PROPERTY

1 ULPIAN, *Edict, book 16:* After the actions available in respect of a collective whole, we come to the action for claiming individual things. 1. This particular action *in rem* is used both in regard to all movable things, whether animate or inanimate, and in regard to land. 2. But no claim can be made by this action for free persons subject to us, such as children in our power; they are claimed, as Pomponius writes in his thirty-seventh book of *Edict*, by prejudicial actions, interdicts, and praetorian inquiry, "unless," he adds, "the plaintiff specifies his title when vindicating." So, if the plaintiff claims "my son" or one "under my power according to Roman law," Pomponius seems to me to agree that he is suing properly. For he states that having specified one's title, one can bring a *vindicatio* under Quiritary law. 3. By this action, according to Pomponius in the twenty-fifth book of his *Readings*, it is not only individual things which may be vindicated; *vindicatio* may also be brought for a flock. The same must apply to a herd of cattle, a troop of horses, and other animals grouped together. It is sufficient if we own the flock itself, even if particular animals may not belong to us; for what is vindicated is the flock, not the individual beasts.

2 PAUL, *Edict, book 21:* If two parties each own an equal number of animals, neither may vindicate the whole flock, nor even half of the whole. But if one of the two has the greater number, so that, when animals belonging to others are subtracted, what he vindicates is none the less the flock, then beasts belonging to others are not restored to him.

3 ULPIAN, *Edict, book 16:* Marcellus, in the fourth book of his *Digest*, writes: "One who had a flock of three hundred head lost a hundred of them and then bought the same number of other beasts from their owner or from a possessor in good faith." These animals also, he observes, will be included in a *vindicatio* of "the flock." Even if the only survivors are those which he has bought as replacements, he can still vindicate "the flock." 1. The items of a ship's tackle should be vindicated individually and the ship's boat should also be vindicated separately. 2. Pomponius writes that if substances of the same nature are so joined and mixed together that they cannot be detached and separated, the *vindicatio* should not be for the whole but for a part. Suppose that my silver and yours have been reduced into one mass; it will be owned by us in common, and each of us may vindicate a portion based on the weight of our share, even though it be uncertain how much in weight each of our shares actually is.

4 PAUL, *Edict, book 21:* In that case the action for dividing common property can also be brought. Anyone who fraudulently arranged for the mixing of the silver will be liable to an action for theft and to an action for production. Just as in the action for production, account must be taken of the market price, so in a *vindicatio* or action for dividing common property, it is the party whose silver was more valuable who receives the greater amount.

5 ULPIAN, *Edict, book 16:* Pomponius also writes: "If corn belonging to two parties has been mixed together without their consent, they each have an action *in rem* for as much of the heap as appears to be respectively theirs. If, however, the lots were mixed together with their consent, they will be deemed to have become common and there will be an action for dividing common property." 1. Again, he writes: "If mead is made from my honey and your wine, some jurists have held that it also is common property." I consider, however, as he himself suggests, that it belongs rather to the maker, since it does not retain its previous character. But if lead is mixed with silver, as it can be detached, the mixture will not become common, and because separation is possible, there will be no action for dividing common property; an action *in rem* may, however, be brought. If detachment is not possible, for example, if bronze and gold have been mixed, he states that a *vindicatio* should be brought for a portion. What was said in regard to mead will not apply here since, although they are joined together, each substance still retains its character. 2. Pomponius also states that if your stallion has made my mare pregnant, the resulting foal will not be yours but mine. 3. In the case of my tree which has been transplanted to someone else's field and thrived and let down roots, Varus and Nerva used to give an *actio utilis in rem*; but if it has not yet taken root, it does not cease to be mine. 4. In an action *in rem*, if there is agreement as to the thing, but mistake in its description, the proceedings are considered valid. 5. If there are several slaves of the same name, for example, several called Eros, and it is not clear which of them is the subject of the action, Pomponius says that no judgment can be given.

6 PAUL, *Edict, book 6:* If someone sues *in rem*, he must specify the thing and say whether he is claiming the whole or a part and, if so, what part. For the term "thing" (*res*) indicates not a kind of thing but a specific thing. Octavenus holds that for materials which have not been made up, one should state their weight, for marked goods their number and for manufactured goods their particular kind; and where the thing is identified by its measurements, they should also be given. But when what we claim is that clothes belong to us or ought to be delivered to us, do we have to give merely their number or also their color? The better view is that both should be stated, but it is quite unreasonable that we should be made to state whether they are worn or new. In the case of household vessels, however, there is a difficulty. Should one just say "a dish" or should one also say whether it is square or round, whether plain or engraved; for it is difficult to include such details in statements of claim? The matter need not be so compressed. Granted that when I sue for a slave, I ought to state his name, and whether he is a boy or an adult, especially if there are more than one; yet, if I do not know his name, I must use a description of him, such as "who is part of such inheritance," or "who is the child of such a mother." So also when one is suing for land, the name and where it is situated ought to be stated.

7 PAUL, *Edict, book 11:* If a third party offers to defend a *vindicatio* for land, and he is condemned, an action for the land can nonetheless be brought against the actual possessor, according to Pedius.

8 PAUL, *Edict, book 12:* Pomponius, in the thirty-sixth book [of *Edict*], approves the view that if you and I own land in common in equal shares, and you and Lucius Titius are in possession of it, I should not sue each of you for a quarter share, but should sue Titius, who is not owner, for a complete half. It would be different if you and he each possessed particular areas of the land; then clearly, I should sue you and Titius for your respective parts of the land. For whenever particular areas are possessed, some part of them must necessarily be mine (and so you also should sue Titius for a quarter). This distinction does not apply to movable property nor to a suit for an inheritance. For then there can never be any possession of a distinct part.

9 ULPIAN, *Edict, book 16:* In this action, the task of the judge is this: He must ascertain whether the defendant is in possession. It is irrelevant on what ground he possesses; for once I have proved that the thing is mine, the possessor will have to deliver

it to me, unless he has pleaded some defense. Some jurists, however, such as Pegasus, have thought that this action was only concerned with that kind of possession which is the subject of the interdicts for possession of land and for possession. Indeed, he says that there can be no *vindicatio* against a depositee or a borrower for use or a hirer of the thing, or against one who is in possession to safeguard legacies or in respect of a dowry or of an unborn child or because he has not received security for anticipated damage. Since none of these "possesses," no *vindicatio* can be brought against them. However, I believe that things can be sued for from anyone who has them and is in a position to deliver them.

10 PAUL, *Edict, book 21:* If a movable thing is sued for, where should it be delivered, assuming it is not on the spot? It is not a bad rule that if the defendant is a possessor in good faith, he should make delivery either where the thing is or where the action is brought, but in that case it should be at the expense of the plaintiff so far as concerns necessary costs of travel by land or water, but excluding provisions.

11 ULPIAN, *Edict, book 16:* Unless the plaintiff prefers that delivery be made where judgment is given, but at his own expense and risk; in that case the defendant will provide a *cautio* for delivery with security.

12 PAUL, *Edict, book 21:* If the defendant is a possessor in bad faith, who obtained the thing in another place, the same rule applies. But if he removed it from the place where the issue was joined and took it somewhere else, he must deliver it, at his own expense, at the place from which he took it.

13 ULPIAN, *Edict, book 16:* The judge has not only to order the thing to be handed over but also to take account of any deterioration it may have suffered. Suppose a slave is handed over who has been weakened or beaten or wounded; the judge will take account of how much less he is now worth, even though the possessor can also be sued by the Aquilian action. The question then arises whether the judge ought not to estimate the loss, unless the Aquilian action is surrendered. Labeo thinks that the plaintiff should give a *cautio* that he will not sue under the *lex Aquilia* and that opinion is correct.

14 PAUL, *Edict, book 20:* If, however, the plaintiff prefers rather to use the Aquilian action, the defendant should be acquitted. Thus, the plaintiff should be given a choice, so that he may obtain twofold damages, but not threefold.

15 ULPIAN, *Edict, book 16:* If the defendant delivers a slave, whom he has beaten, Labeo says that the plaintiff also has an action for insult. 1. If the defendant has sold the thing out of necessity, then probably the judge in the exercise of his discretion should give him relief to the extent that he ought merely to hand over the price. If he has gathered fruits and sold them to prevent them being spoiled, he will similarly be liable for no more than their price. 2. If, say, the action concerns a field, which has been allocated to soldiers with a small sum being given to the possessor as a compliment, does he have to hand that over? I think he does. 3. If the action concerns a slave or animal which has died, otherwise than by the possessor's fraud or fault, several jurists say that he is not liable for the value. But the better view is that if the plaintiff, had he received the thing back, might have sold it, and delivery was overdue, the defendant should be liable. For if he had delivered it to the plaintiff, the latter would have sold it and so have profited by the amount of the price.

16 PAUL, *Edict, book 21:* Normally, of course, on the death of a slave, there is need for a judgment to deal with profits and the slave's offspring and the stipulation against eviction by a third party. For after joinder of issue, the possessor ought not to be liable for accident. 1. It is not considered to be fault on the part of the possessor, if he has sent a ship, which is the subject of an action, to sea during the season for voyages, even though it has been lost, unless he entrusted it to an incompetent crew.

17 ULPIAN, *Edict, book 16:* In the sixth book of his *Digest*, Julian writes that if I have bought from Titius a slave owned by Maevius, and then, when Maevius sues me to recover it, I sell it and the buyer kills it, justice requires that I should hand over the

price to Maevius. 1. In the same book, Julian also writes that if the possessor has delayed the delivery of the slave and it dies, account must be taken of the profits he has received up to the time of judgment. Julian further says that the possessor's liability is not just for profits but for every advantage received; and so the slave's offspring, and any profits accruing to the offspring, must be handed over too. Account is taken of all advantages to the extent that, as Julian writes in the seventh book, if through the slave the possessor has acquired a right to the Aquilian action, he should be compelled to transfer it. If the possessor has fraudulently ceased to possess the slave and someone has unlawfully killed it, the possessor is compelled to transfer either the value of the slave or his right of action, whichever the plaintiff wishes. Since he must make no gain from a slave which has become the subject of an action, the possessor must hand over any profits which he has collected from another possessor. But he is not bound to hand over profits accruing at a time when the slave was possessed by a third party who had recovered possession by action. Julian's remarks about the Aquilian action apply when, after joinder of issue, the possessor has acquired ownership by usucapion, since he then begins to have full rights in the thing.

18 GAIUS, *Provincial Edict, book 7:* If after issue has been joined, the possessor becomes owner by usucapion, he must still deliver and give a *cautio* against fraud. For there is a risk that he may have pledged or manumitted the slave.

19 ULPIAN, *Edict, book 16:* Labeo says that the defendant is also himself entitled to a *cautio* that he will be "indemnified in the matter"; if, say, he has given a *cautio* to someone else about anticipated damage in respect of land.

20 GAIUS, *Provincial Edict, book 7:* Furthermore, the possessor must also hand over anything he has acquired through the slave after joinder of issue otherwise than from his own property, including any inheritances and legacies which have come to him through that slave. For it is not enough that the thing itself be handed over; the advantages accruing from it must also be handed over. The aim is that the plaintiff should have everything that he would have had, if the slave had been delivered to him at the time when the action was begun. Thus, the child of a female slave must be handed over, even though it was born after the possessor had acquired ownership of the mother by usucapion subsequent to issue being joined. In that case, the same rule applies to the child as to the mother slave, and both delivery and a *cautio* against fraud are required.

21 PAUL, *Edict, book 21:* If a slave has run away from a possessor in good faith, we should ask whether the slave was such that he ought to have been kept in custody. For if he appeared to be of unblemished reputation, so that he did not need to be kept in custody, the possessor should as a rule be acquitted. If, however, he has usucapted the slave in the meantime, he must transfer his rights of action to the plaintiff and be liable for the profits accruing during the time that he possessed the slave. If he has not yet usucapted, he should be acquitted without giving any *cautiones*, so that he need give no *cautio* to the plaintiff about tracing the slave. For cannot the plaintiff trace it just as well himself, even though in the meantime, while the slave is on the run, the defendant has usucapted? Pomponius writes in the thirty-ninth book of *Edict* that this is not unjust. If, on the other hand, the slave ought to have been kept in custody, the defendant should be condemned in the value of the slave itself, provided that the plaintiff assigns his rights of action to him, if the defendant has not yet usucapted. Julian holds, however, that in those cases, where the possessor is acquitted because a slave is in flight, although he is not compelled to give a *cautio* about tracing the slave, yet he should give a *cautio* that if he gets hold of it, he will still restore it. Pomponius, in the thirty-fourth book of his *Readings*, approves, and it is the better view.

22 ULPIAN, *Edict, book 16:* If the slave runs away through the fraud of the possessor, the latter should be condemned as if he were in possession.

23 PAUL, *Edict, book 21:* Anyone who has acquired ownership either by the *ius gentium* or the *ius civile* has an action *in rem*. 1. We cannot bring an action *in rem* for consecrated and religious ground as if it belonged to us. 2. "A" attaches something

belonging to "B" to his own thing so that it becomes part of it; for example, he fixes an arm or leg belonging to "B" to his own statue, or a handle or base to a bowl, or a figure to a chandelier, or a leg to a table. Most writers correctly say that "A" has become the owner of the whole and will be able to state truly that the statue or bowl is his. 3. Whatever is written on my paper or painted on my board at once becomes mine. Although in the case of a painting some writers have held the opposite, on account of a painting's value, yet where one thing cannot exist without the other, it necessarily accedes to that other. 4. In all those cases in which my thing by its predominance attracts to itself something belonging to another person and makes it mine, if I vindicate the thing, I shall, through the defense of fraud, be made to pay the value of what has accrued to me. 5. Where a thing has been joined or attached to another thing and so merges with that other by way of accession, the former cannot be vindicated by its owner, so long as the two are stuck together. He can, however, sue by the action for production to have it detached and then vindicate it. This is subject to the exception mentioned by Cassius in regard to welding. He says that if an arm of a statue has been joined to the rest of the statue by welding, it is merged in the unified whole of the larger part, and once it has become another's property cannot, even though later broken off, revert to its former owner. It is not the same with what has been soldered with lead, because welding effects fusion of two things made of the same material, whereas soldering does not have that effect. And so, in all these cases in which there are grounds neither for an action for production nor for an action *in rem*, an *actio in factum* is necessary. But in the case of things which consist of a number of individual objects, it is accepted that all of them retain their separate identities, as, say, individual men or individual sheep. Thus I can vindicate a flock of sheep, even though your ram is mixed in with them, and you can vindicate the ram. The situation is different where the parts of the whole are stuck together; for if you fix an arm from someone else's statue on to my statue, it cannot be said that the arm is yours, because the complete statue constitutes a single whole. 6. Where "A's" timbers have been joined to "B's" house, "A" cannot vindicate them on account of the *Law of the Twelve Tables*. Nor can he bring an action for production in respect of them, except against one who knowingly joined "A's" timbers to his own house. There is, however, an ancient action for an attached beam, for double damages, which derives from the *Twelve Tables*. 7. Where "A" builds on his own land with "B's" stone, he can vindicate the house, but "B" will vindicate the stone if it should be dismantled. This is so even though the building is taken to pieces after it has been possessed by a possessor in good faith and the period of usucapion has elapsed. For although that possessor may have acquired the house by lapse of time, the individual stones are not usucapted.

24 GAIUS, *Provincial Edict, book 7:* Anyone who contemplates suing for a thing ought to consider whether he can obtain possession of it by some interdict. For it is far more convenient for him to be in possession himself and put the burden of being plaintiff on his opponent than for him to sue with his opponent in possession.

25 ULPIAN, *Edict, book 70:* Marcellus discusses the case of someone who offers to defend a suit without good cause when he is neither in possession nor has fraudulently ceased to be in possession. He holds that he should not be acquitted if the plaintiff is unaware of the facts; and that opinion is correct. It assumes that issue has been joined; for if issue has not been joined, a party who denies that he is in possession, when he really is not, does not deceive the plaintiff, and if he withdraws, he is not considered to have offered to defend the suit.

26 PAUL, *Plautius, book 2:* And if the plaintiff knows the truth, he is not deceived by anyone but himself, and so the defendant is acquitted.

27 PAUL, *Edict, book 21:* I was seeking to sue Titius for something, when a third party asserted that he was in possession and offered to defend the action. If, in the course of the proceedings, I have proved that to be so by evidence, he ought in every respect to be condemned. 1. The defendant ought at least to be in possession both at the time of joinder of issue and at the time of judgment. If he possessed at the time of joinder of issue, but has lost possession without fraud when judgment is given, he ought to be acquitted. If he

was not in possession at the time of joinder of issue, but when judgment is given he is in possession, Proculus's view should be followed that he should in every respect be condemned. So judgment will be given against him in respect of profits received from the time when he began to possess. 2. If a slave, the subject of an action, has been fraudulently damaged by the possessor and then without fault on the latter's part dies from some other cause, no account is taken of the damage, since the plaintiff has no interest in it. This rule refers to an action *in rem*; the Aquilian action continues. 3. Anyone who before joinder of issue has fraudulently ceased to possess is liable to an action *in rem*. This may be inferred from the statute which, as we have said, laid down that past fraud should be taken into account in the action for an inheritance. For if past fraud is a relevant factor in the action for an inheritance, which is itself an action *in rem*, it not unreasonably follows that it should be relevant also in an action *in rem* for a specific thing. 4. Suppose a father or owner is in possession through his son or slave, and the latter is away at the time when judgment is given, without fraud on the part of the father or owner. In such a case, the possessor must be allowed time [to satisfy the judgment] or must give a *cautio* to hand over possession. 5. If before joinder of issue the possessor has incurred expense on the thing, the subject of an action, that expense is brought into account by the possessor raising the defense of fraud, so long as the plaintiff continues the action without paying for it. The same applies if the possessor defends a noxal action in respect of a slave and after condemnation pays damages or if by mistake he builds a block of flats on a site belonging to the plaintiff, unless the plaintiff is prepared to allow the building to be taken down. According to some jurists, the same rule should apply in the case of a site granted to a wife in a judgment for recovery of dowry. However, Proculus considers that the rule should not be followed, where you have educated my boy slave whom you had in your possession, because I ought not to be deprived of my slave. So the remedy described in the case of the site cannot apply,

28 GAIUS, *Provincial Edict, book 7:* where, say, you have taught him to be a painter or a clerk. It is held that the judge's task does not extend to putting a value on that,

29 POMPONIUS, *Quintus Mucius, book 21:* unless you put the slave up for sale and may expect to get a better price for him on account of his skill,

30 GAIUS, *Provincial Edict, book 7:* or prior notice was given to the plaintiff to pay the expense and the possessor has raised the defense of fraud because he ignored it.

31 PAUL, *Edict, book 21:* When there is an inquiry into the profits derived from a slave, the subject of an action, it is not only the period when the slave was an adult which is material. For certain services can be provided even by a child. It would, however, be quite wrong for the plaintiff to claim a valuation of the profits which could have been derived from the slave's special skill, when that skill was learned at the possessor's expense.

32 MODESTINUS, *Differences, book 8:* Where the possessor has made a slave a craftsman, then once that slave is over twenty-five years old, the expenses incurred can be set off [against profits].

33 PAUL, *Edict, book 21:* The profits to be valued include not only those actually received but also those which could properly have been received. Thus, if the subject of the action has been lost through the fraud or fault of the possessor, the better view, according to Pomponius, is that of Trebatius. He considered the plaintiff to be entitled to profits for as long as he would have been if the thing had not been lost, that is, until the time of judgment; and this is also Julian's view. By the same principle where the plaintiff suing for a thing is the bare owner, and while the defendant is in default the usufruct comes to an end, the plaintiff is entitled to profits from the time at which the usufruct reverted into the ownership.

34 JULIAN, *Digest, book 7:* The same rule applies also where through alluvion an addition accrues to land.

35 PAUL, *Edict, book 21:* Conversely, if, after joinder of issue, the plaintiff bequeaths the usufruct, it is rightly thought that there should be no liability for profits from the moment at which the usufruct was separated from the ownership. 1. Where "A" brings an action for land belonging to "B" and the judge declares it to be "A's," he must include in his

judgment an order in regard to profits. For the same mistake requires that the possessor be condemned also regarding profits. No profit must accrue to a possessor who has lost the action. Otherwise, as Mauricianus points out, the judge would not really be ordering the restoration of the things to "A." Why should the possessor enjoy what he would not have enjoyed if he had handed over possession at once? 2. A plaintiff who has accepted a valuation in lieu of the thing is not forced to guarantee the possessor against eviction from the thing by a third party. If he does not hand over the thing to the plaintiff, the possessor has only himself to blame. 3. Where a thing cannot be divided without being destroyed, it is accepted that action can be brought for a share in it.

36 GAIUS, *Provincial Edict, book 7:* When action is brought to claim a thing, the plaintiff should find out, lest he sue in vain, whether the party he is suing is in possession or has fraudulently ceased to possess. 1. The defendant may also be condemned if he has ceased to possess by his fault, and a possessor is guilty of fault if he sends a slave to dangerous places and it is lost; or if he orders a slave, who is being claimed from him, into the arena, and it is killed; if he fails to guard a slave claimed from him who is a runaway, if in fact it runs away; and if he sends a ship claimed from him to sea in bad weather and it is wrecked.

37 ULPIAN, *Edict, book 17:* In the eighth book of his *Digest,* Julian writes: "If I build on someone else's site which I have possessed in good faith, but I build at a time when I already know that it belongs to another, let us see whether there is any possible defense available to me." It might be argued that the defendant's apprehended loss gives him a defense. I think, however, that there is no defense in this case. For he ought not to have put up the building once he knew that the site was another's. Yet he should be allowed to take down the building which he has put up, so long as it is without loss to the owner of the site.

38 CELSUS, *Digest, book 3:* You inadvertently bought land belonging to another, built or planted on it, and then were evicted by the owner; the good judge's order will vary according to the persons involved and the facts of the case. Suppose the owner would have done the same as you. In that case, in order to get his land back, he must pay your expenses to the extent that the value of the land has been increased, or if the increase in value is more than the expenses, then only the amount you expended. Suppose the owner is a poor man who, if made to pay such a sum, would have to give up his household gods and ancestral graves. In that case, it is enough that you be allowed to take away what you can from the building materials, so long as the land is not thus put in a worse condition than it would be in, if there had been no building. Our decision is that if the owner is prepared to pay the possessor as much as he would have if he took the materials away, he should have the power to do so. There must be no indulgence to malice. If, say, you want to scrape off plaster which you have put on walls, and deface pictures, that will serve no purpose but to annoy. Suppose the owner is someone who wants to sell the land as soon as he gets it back; unless he pays what we said should be paid in the first case, then the judgment against you is reduced by that amount.

39 ULPIAN, *Edict, book 17:* Contractors who build with their own stones make them immediately the property of the owners of the ground on which they build. 1. Julian correctly writes in the twelfth book of his *Digest* that a woman who pledges land as security for another's debt can claim it by action *in rem,* even though it has been sold by the creditor,

40 GAIUS, *Provincial Edict, book 7:* because the creditor is considered to have sold what was not pledged.

41 ULPIAN, *Edict, book 17:* If a person bought subject to this condition, that if a better offer is made, the sale should be rescinded, then once such an offer has been made, the buyer cannot bring an action *in rem.* But even if someone has a right to an estate sub-

ject to *in diem addictio*, then, before it happens, he can bring an action *in rem*; after it has happened, he cannot. 1. If a slave or a son in parental power, having free management of his *peculium*, has sold and delivered land to me, I can bring an action *in rem* for it; and if he delivers his principal's thing with his principal's consent, the same applies. So also when a procurator has sold and delivered with his principal's consent, that will give me an action *in rem*.

42 PAUL, *Edict, book 26:* In an action *in rem*, the heir of a [deceased] possessor, if he does not [possess himself, is acquitted, but if] the deceased personally incurred some liability, it will lead to judgment against the heir.

43 PAUL, *Edict, book 27:* Whatever is attached to religious land is itself religious, and so stones, which have been built in, cannot be vindicated, even after they have been removed. However, the plaintiff will be assisted, outside the normal forms of action, by the grant of an *actio in factum* to compel the person responsible to restore them. But if "A's" stones, without his consent, have been built into a funerary monument on "B's" land, and, before it has served as a tomb, they have been removed so that they can be used elsewhere, "A" will be able to vindicate them. Indeed, if they are removed in order that they should be put back again, it is accepted law that "A" can recover them by [the usual] action.

44 GAIUS, *Provincial Edict, book 29:* Fruit on the tree is considered part of the land.

45 ULPIAN, *Edict, book 68:* Where after an action to recover a slave has begun, the defendant hands over the slave, I think that if he is in good faith, he should give a *cautio* only against fraud. But if he is not in good faith, he should do so also against negligence. Indeed, so should a possessor in good faith, if he delivers after issue has been joined.

46 PAUL, *Sabinus, book 10:* Where a thing, which has been [successfully] sued for by action *in rem*, is valued [instead of being handed over] at the sum which the plaintiff swore for the purposes of the action, the ownership at once passes to the possessor. For the latter is deemed to have negotiated and settled the matter with the plaintiff at his own valuation.

47 PAUL, *Plautius, book 17:* That is, if the thing is present. If it is somewhere else, then [ownership passes] only when the possessor obtains possession of it with the plaintiff's consent. It follows, therefore, that the judge's valuation should be made only if the plaintiff has given a *cautio* that he will do nothing to prevent possession being delivered.

48 PAPINIAN, *Replies, book 2:* Where a possessor in good faith has incurred expense on land which is shown to belong to someone else, he can recover it neither from one who gave him the land as a gift nor from the owner. However, he can be indemnified by raising the defense of fraud, at the judge's discretion based on principles of fairness, so long as his expenses exceed the amount of profits which he received before joinder of issue. Thus, since set-off is allowed, the owner is made to pay the amount spent in excess of profits, where the land has been improved.

49 CELSUS, *Digest, book 18:* I consider that the ground [on which a house is built] is part of the house and does not just lie underneath it in the way the sea does to ships. 1. Whatever remains from my property which I have a right to vindicate is itself mine.

50 CALLISTRATUS, *Monitory Edict, book 2*: Where a field pertains to someone as a result of a purchase, he cannot properly sue by this action before the field has been

conveyed to him and subsequently possession has been lost. 1. However, an heir may properly sue for something belonging to the inheritance, although he has not yet obtained possession of it.

51 POMPONIUS, *Sabinus, book 16:* Where an action *in rem* has been brought and judgment is given against the possessor's heir, that judgment takes account also of the heir's negligence and fraud.

52 JULIAN, *Digest, book 55:* If, before joinder of issue, the possessor of land fraudulently ceases to possess it [and dies], his heirs should not be made to defend an action *in rem.* However, an *actio in factum* ought to be granted against them, to make them hand over any enrichment they have received from the property.

53 POMPONIUS, *Sabinus, book 31:* If the possessor of land has cultivated or sowed it and later the land is recovered from him by action, he cannot remove what he had planted.

54 ULPIAN, *Opinions, book 6:* There is a considerable difference between the role of the advocate and the pleading of one's own case. So one who subsequently discovered that a thing belonged to him has not lost his ownership because at a time when he did not know it was his he assisted someone else who was vindicating it.

55 JULIAN, *Digest, book 55:* If, before joinder of issue, the possessor of land dies, leaving two heirs, and action is brought to recover the whole land from one of them, who is in possession of the whole, there should be no doubt that he ought to be condemned for the whole.

56 JULIAN, *Digest, book 78:* A *vindicatio* is not allowed for a *peculium* as it is for a flock, but a party to whom a *peculium* has been bequeathed may sue for the individual items in it.

57 ALFENUS, *Digest, book 6:* While an action was being brought for land by "A," the defendant was sued in respect of the same land by "B." Question: If the defendant, at the judge's direction, hands over the land to one of the two, and later it is adjudged to the other claimant, how can the defendant avoid a double loss? My answer was that whichever of the two judges gave judgment first, he should direct that the land be handed over to that plaintiff on condition that he gave a *cautio* to the possessor with security that if the other plaintiff should win a judgment for recovery of the land, he would be liable for it.

58 PAUL, *Epitome of the Digest of Alfenus, book 3:* A man who was sued both for recovery of a slave and also for theft committed by the same slave asked what he should do if he were condemned in both actions. The answer was that if the first judgment was for recovery of the slave, the judge should not make him hand it over unless he was given security that if he had to pay damages as a result of judgment in the other case concerning the slave, he should be properly indemnified. However, if the first judgment was in respect of the theft and he had surrendered the slave noxally and then judgment was given for the plaintiff in the action for recovery of the slave, the judge should not award damages for failure to deliver the slave, since the defendant's failure to deliver it was not attributable to his fraud or negligence.

59 JULIAN, *From Minicius, book 6:* The occupier placed windows and doors in buildings belonging to someone else, and after a year the owner of the buildings removed them. Question: Can the man who installed them vindicate them? The answer was that he can. For anything affixed to another's buildings are part of those buildings as long as they remain attached, but as soon as they are detached, they immediately revert to their former condition.

60 POMPONIUS, *Sabinus, book 29:* When the possessor is a child or insane and he destroys or damages something, the act is not penalized.

61 JULIAN, *From Minicius, book 6:* Minicius was asked whether, if "A" repaired his ship with wood belonging to "B," the ship would nevertheless remain in "A's"

ownership. He replied that it would. If, however, "A" did the same thing while building the ship, it could not. JULIAN notes: since the ownership of the whole ship follows the legal condition of the keel.

62 POMPONIUS, *Questions, book 6:* If a possessor in bad faith is sued for a ship, its profits should be estimated just as in the case of a shop or a site which is normally let. This is not in conflict with the rule that if a [supposed] heir does not touch money which is on deposit, he is not made to pay interest on it. It is true that freight charges and interest payments are alike in that they do not accrue naturally but derive from a legal relationship. However, in this case, freight can be demanded from the possessor of the ship, since he is not to be liable to the plaintiff for risk, whereas when money is lent out at interest, [as against the plaintiff] the lender bears the risk. 1. As a general rule, in any question concerning the valuation of profits, it is accepted that what ought to be considered is not whether the possessor in bad faith enjoyed the profits himself, but whether the plaintiff would have been able to enjoy them, if he had been allowed to possess the property; and Julian also approved this view.

63 PAPINIAN, *Questions, book 12:* If someone has lost possession through his own fault, but without fraud, since he must submit to paying the assessed value, his application ought to be granted by the judge, if he asks that his opponent transfer his own action to him. As the praetor will give him aid at any time, whoever is in possession, he will suffer no disadvantage. Indeed, he must be aided even when the party in possession is the one who received the assessed value; and the latter should not readily get a hearing if, having once received the assessed value as a result of the judge's order, at the risk of the defendant against whom judgment was given, he should afterward seek to give back the money [in exchange for the thing].

64 PAPINIAN, *Questions, book 20:* In any action *in rem*, it is clear that profits should be payable also in respect of things which are held not for profit but for use.

65 PAPINIAN, *Replies, book 2:* The buyer who bought land from a nonowner will, if he raises the defense of fraud, only be made to hand it over to the owner subject to a condition. This is that he shall be repaid any money which he paid to a creditor of the owner, who had taken the land in pledge as security, plus the balance of interest for the intervening period. That is on the assumption that such interest exceeds the amount of profits he received before the trial. For such profits can in fairness only be set off against later interest in the same way as money spent on improvements to land. 1. A man gave a female slave to his daughter not as part of her dowry but as part of her *peculium*. If, then, he fails to bequeath the *peculium* to her, it is agreed that the slave is part of the residue of his estate. If, however, the father disinherited the daughter in consideration of her dowry and *peculium* and, giving that reason expressly, left her nothing in his will or bequeathed her that much less, then the daughter will have a defense [to the heir's action for the slave], based on her father's intention.

66 PAUL, *Questions, book 2:* We may nonetheless properly vindicate what is ours, even though we expect to lose the ownership if a condition attached to a legacy or a gift of freedom should be fulfilled.

67 SCAEVOLA, *Replies, book 1:* A man who bought a house from the tutor of a *pupillus* sent a carpenter to repair it, and he found some money. To whom does it belong? My reply was that if the coins were not treasure but were money lost by chance or were by mistake not removed by the person entitled, then they were still the property of the former owner.

68 ULPIAN, *Edict, book 51:* A party is ordered by the judge to hand something over, does not obey, and claims that he is unable to do so. If, indeed, he has the thing, then he is dispossessed by armed force at the judge's direction, and the judgment against him is restricted to profits and matters arising out of the action. If he is unable to deliver and has fraudulently arranged it, judgment should be given against him for

whatever amount his opponent swears as the value without any limitation. If he is unable to deliver but did not fraudulently arrange it, judgment should be given against him for no more than the thing is worth, that is, the amount of his opponent's interest. These are general rules, applicable whenever a judge orders something to be handed over, whether in an interdict or in an action *in rem* or in an action *in personam.*

69 PAUL, *Sabinus, book 13:* Where someone has fraudulently arranged not to possess, he is further penalized in that the plaintiff is not bound to give him a *cautio* to assign to him any actions he may have in respect of the thing.

70 POMPONIUS, *Sabinus, book 29:* And it is agreed that he should not even be granted the quasi-Publician action, since otherwise it might be possible, by paying the fair price of a thing, to acquire it by force against the will of the owner.

71 PAUL, *Sabinus, book 13:* If the possessor committed fraud, but the plaintiff does not wish to swear an oath, preferring that judgment be given against his opponent merely in the [objective] value of the thing, his wishes should be followed.

72 ULPIAN, *Edict, book 16:* "A" buys from Titius land belonging to Sempronius, and on his paying the price, it is delivered to him. Then, Titius becomes heir to Sempronius and sells and delivers the same land to "B." It is fairer that "A" should have the prior claim. For even if Titius should sue him for the land, "A" may defeat him with a defense. And if Titius were in possession and "A" should sue him, "A" would have a replication to counter his defense of ownership.

73 ULPIAN, *Edict, book 17:* In an action for a specific thing, the possessor is not bound to declare the extent of his share of it. That is the duty of the plaintiff, not of the possessor. The same practice is observed also in the Publician action. 1. To a superficiary,

74 PAUL, *Edict, book 21:* that is, one who has a *superficies* in someone else's ground, for which he pays a fixed rent,

75 ULPIAN, *Edict, book 16:* the praetor promises an action *in rem* after an investigation of the circumstances.

76 GAIUS, *Provincial Edict, book 7:* Our statements about *vindicatio* of a whole thing should be understood to apply equally to that of a part, and the judge would, as a matter of course, order that anything to be delivered together with the part should be delivered proportionately. 1. A *vindicatio* of an unascertained part is granted for good cause. Such good cause may exist, if, say, a will is affected by the *lex Falcidia,* but since the judge did not go into the matter sufficiently, the amount to be deducted from the legacies is uncertain. In such an event, a legatee to whom a slave had been bequeathed would have good cause not to know the share which he ought to claim and so a *vindicatio* of an unascertained part will be granted. The same rule is applicable to other matters also.

77 ULPIAN, *Edict, book 17:* A woman made a gift of land by letter to a man who was not her husband and then took from him a lease of the same land. It might be argued that he has an action *in rem* on the ground that he acquired possession through the woman herself as his tenant. The actual facts were that the donee had been on the land when the letter was sent, and that was sufficient for possession to be transferred to him, even in the absence of a lease.

78 LABEO, *Plausible Views, Epitomized by Paul, book 4:* If you have possessed land belonging to another and have not collected the fruit, you have no obligation to hand over anything by way of profits of that land. PAUL: The proper question is rather this: Has the possessor acquired the fruit because he has gathered it for himself? We must regard fruit as "gathered," not only when it has been completely collected together but also when gathering has been carried to the point where the ground has ceased to support the fruit, such as when olives or grapes have been picked, but no one has yet

made oil or wine from them. For at that point one is deemed to have gathered the fruit.

79 LABEO, *Plausible Views from Paul's Epitome, book 6:* If you sue me for a slave and after joinder of issue the slave dies, there should be a valuation of profits for the period during which he was alive. PAUL: I think this is true only if the slave did not earlier become so ill that his labor was useless. For if he had been alive in that state of health, it would not have been right to make a valuation of profits in respect of that period.

80 FURIUS ANTHIANUS, *Edict, book 1:* We are not forced to have an action *in rem* brought against us. For anyone may declare that he is not in possession and if then the other party can prove that in fact he does possess, that other party may by judge's order transfer possession to himself, even though he has not proved his ownership.

2

THE PUBLICIAN ACTION *IN REM*

1 ULPIAN, *Edict, book 16:* The praetor says: "If a man claims something, which has been delivered to him for good cause by a nonowner and has not yet been usucapted, I will grant him an action." 1. The praetor rightly says: "not yet been usucapted"; for if it has been usucapted, the claimant has a civil action and does not need a praetorian one. 2. But why did he only mention delivery and usucapion, when there are many legal grounds for acquiring ownership? Legacy, for example,

2 PAUL, *Edict, book 19:* or gifts made in contemplation of death; if the donee loses possession, the Publician action is available, since such gifts are treated as analogous to legacies.

3 ULPIAN, *Edict, book 16:* There are several other grounds. 1. The praetor says: "for good cause," and so anyone who has good cause for receiving delivery may bring the Publician action. That action is available not only to a buyer in good faith but also to others, such as a party to whom something has been delivered by way of dowry but which has not yet been usucapted. That is an eminently good cause whether the thing was given as dowry at a valuation or not. So also if a thing has been delivered following a judgment

4 PAUL, *Edict, book 19:* or in discharge of a debt

5 ULPIAN, *Edict, book 16:* or by way of noxal surrender, whether the ground for surrender was true or false.

6 PAUL, *Edict, book 19:* In a case of noxal surrender where, in the absence of a defense and at the praetor's direction, I have taken away a slave and have then lost possession, I may bring the Publician action.

7 ULPIAN, *Edict, book 16:* If the thing has been assigned to a party by judgment of a court, he may bring the Publician action. 1. Where there is a valuation of a thing for the purposes of an action, the effect is similar to a sale. Julian says in the twenty-second book of his *Digest* that if the defendant offers the amount of the valuation, he may have the Publician. 2. Marcellus writes in the seventeenth book of his *Digest* that a party who bought from an insane person, not knowing that he was insane, can usucapt, and, therefore, he will have the Publician as well. 3. If a party receives something as a volunteer, he has the Publician, and it is available even against the donor. For he may still claim as a possessor for good cause, even though he received it gratuitously. 4. When a party buys from a *minor* (under twenty-five), not knowing that he was a *minor*, he has the Publician. 5. Where there has been a barter, the same action applies. 6. The Publician action is based on the model of ownership, not on that of possession. 7. If I sue you for a thing and you tender me an oath, and I then swear that the thing is mine, I have the Publician action but only against you. For the oath should prejudice only the party who tendered it. If the oath is tendered to the possessor and he swears that the thing does not belong to the plaintiff, he will have a defense only against the plaintiff and no right of action. 8. In the Publician action, all

the same rules apply which were discussed in relation to *vindicatio*. 9. The action is available to the heir and also to praetorian successors [of a deceased claimant]. 10. If it is not I who buy the thing but my slave, I will still have the Publician; the same applies if the buyer is my procurator or tutor or curator or someone acting on my behalf without authorization. 11. The praetor says: "who buys in good faith." Thus, not every buyer qualifies, but only one who buys in good faith. So it is enough if I bought in good faith even though I did not buy from the owner; and even if the seller intended to deceive, his fraud will not prejudice me. 12. In this action, it is no impediment to me if I am the buyer's successor and I acted fraudulently, so long as the party to whose place I succeeded bought in good faith. And it is of no benefit to me if I am innocent of fraud when the buyer, whom I succeeded, acted fraudulently. 13. If it was my slave who bought, it is his fraud which must be taken into account, not mine, and contrariwise [his good faith]. 14. In the Publician, it is the time of the purchase that is material, and so, in Pomponius' view, fraud committed either before or after the purchase cannot be cited in the action. 15. The good faith of the buyer alone is relevant. 16. Consequently, for the Publician to apply, the following conditions must be present: There must be a buyer in good faith, and what he buys must be delivered to him on that account. Until delivery, even though one is a buyer in good faith, one cannot bring the Publician. 17. Julian, in the seventeenth book of his *Digest*, wrote that delivery of what has been bought must be received in good faith. So if, when taking possession a buyer knows that the thing belongs to someone else, he cannot bring the Publician, since he cannot usucapt. No one should imagine that we consider it a sufficient condition for bringing the Publician that the buyer be ignorant merely at the beginning of delivery that the thing belongs to another. He must be a buyer in good faith also later on.

8 GAIUS, *Provincial Edict, book 7:* But nothing is said about the price being paid from which it may be inferred that it was not the praetor's view that any account should be taken of whether the price has been paid.

9 ULPIAN, *Edict, book 16:* Whether the thing is delivered to the buyer or to the heir of the buyer, in either case the Publician is available. 1. If a party buys something that has been deposited with him or lent to him or pledged with him, it should be regarded as delivered to him if it stays with him after the purchase. 2. And the same applies if delivery preceded the purchase. 3. If I buy an inheritance and I want to sue for something belonging to the inheritance which has been delivered to me, according to Neratius, my action will be the Publician. 4. If separate sales [of the same thing] have been made to two parties, each of whom bought in good faith, which of them has the better right to the Publician, the one to whom the thing was first delivered or the one who merely bought it first? Julian, in the seventh book of his *Digest*, writes that if the two buy from the same nonowner, the one to whom the thing is first delivered has the stronger claim. But if they buy from different nonowners, the one in possession is in a better position than the one who sues, and this is the correct view. 5. This action is not available for things which cannot be usucapted, such as stolen things or fugitive slaves. 6. A slave forming part of an inheritance buys something before entry by the heir has it delivered to himself and then loses possession. The heir can properly bring the Publician, as if he himself had possessed. Citizens of a municipality are in the same condition where something has been delivered to one of their slaves,

10 PAUL, *Edict, book 19:* whether the slave bought with his *peculium* or not.

11 ULPIAN, *Edict, book 16:* If I buy something and at my request it is delivered to another, then according to a rescript of the Emperor Severus, he should be granted the Publician. 1. Where action is brought for a usufruct which has been delivered, the Publician is granted. So also where servitudes have been created over urban lands by delivery or by sufferance (as where, say, someone has allowed a watercourse to be channeled through his house); similarly, in the case of servitudes over rustic lands; for there also it is accepted law that delivery and sufferance have legal effect. 2. Where

a child of a stolen slave-woman was conceived while she was in the house of a buyer in good faith, he can sue for the child by this action even though he never possessed it. However, the heir of the party who stole the slave does not have the action, because he inherits the defects of the deceased. 3. Sometimes the action is available even where the mother who was stolen has not been sold. Where, without my knowing of the theft, she was given to me as a gift, and while in my house conceived and bore a child, I have the Publician to recover the child, so long, says Julian, as I do not know at the time when I bring the action that the mother had been stolen. 4. Julian also states it as a general rule that on whatever ground I could usucapt the mother, if she were not stolen, on that ground I can usucapt the child, if I do not know that the mother has been stolen. So in all such cases I will have the Publician. 5. The same rule applies in the case of the child of a child, and in that of a child who was not born [normally], but was brought from the mother's womb after her death by section as Pomponius writes in the fortieth book [of *Edict*]. 6. He also says that where a house has been bought and destroyed, any accessions to it can be recovered by this form of action. 7. An accession to land by alluvion becomes similar in condition to the land to which it accedes. So if that land cannot be recovered by the Publician, the accession cannot either; if it can be recovered, as Pomponius writes, then [the Publician applies] also to the part which acceded by alluvion. 8. Pomponius adds that if one buys a statue and then sues for parts of it that are missing, a similar action is available. 9. Again, he writes that if I buy a plot of land and build a block of flats on it, I can properly use the Publician. 10. So, he states, if I have bought a block of flats and it becomes a vacant site, I can equally use the Publician.

12 PAUL, *Edict, book 19:* A man engaged to be married made a gift of a slave to his betrothed, and before it was usucapted, he received it back as dowry. The deified Emperor Pius laid down that if there was a divorce the slave should be restored [to the former wife]. For the gift, being between a betrothed couple, was valid. She will be granted a defense if she is in possession, and the Publician if she has lost possession, whether it is a third party or the donor who is in possession. 1. Where an inheritance has been handed over to a party as a result of the Trebellian law, he may use the Publician, even though he has not yet acquired possession. 2. In the case of lands subject to rent-charge (*vectigal*) and other lands that cannot be usucapted, I have the Publician, if I happen to be in good faith when they are delivered to me. 3. The same applies if in good faith I have bought from a nonowner a block of flats that is *superficies*. 4. If a thing is such that a statute or *constitutio* forbids its alienation, the Publician does not apply. In such cases, the praetor offers no protection, in order that no one should act contrary to law. 5. One can use the Publician action even for a baby slave who is not yet a year old. 6. One can use the Publician action where one wants to sue for a part of a thing. 7. Even one who has been in possession only for a moment may properly bring this action.

13 GAIUS, *Provincial Edict, book 7:* Wherever we acquire things on any good ground recognized for the acquisition of things and then lose them, we will be granted this action to recover those things. 1. But occasionally the Publician action is not available even when the possession is lawful. Possession as a result of pledge or *precarium* is lawful, but in such cases the action is not normally available, the reason being that neither the pledge-creditor nor the holder *in precario* acquires possession with such a state of mind that he believes himself to be owner. 2. Where someone buys from a *pupillus*, he must prove that he bought with the tutor's approval and in the face of no statutory prohibition. But if he is deceived into buying by the approval of a false tutor, he is deemed to have bought in good faith.

14 ULPIAN, *Edict, book 16:* Papinian, in the sixth book of his *Questions*, writes: Where, at "A's" request, something of his has been sold by his procurator and "A" then forbids

delivery of the thing sold, or notifies to that effect, but the procurator nevertheless delivers it, the praetor will protect the buyer, whether he is in possession or is suing for the thing. If the procurator incurs liability to the buyer in an action on the sale, he may sue "A" by *actio contraria* on the mandate. It may happen that the principal who gave the mandate to sell recovers the thing from the buyer, because the latter, through ignorance, has failed to raise a defense which he ought to have pleaded, such as "unless the seller to me sold at your request."

15 POMPONIUS, *Sabinus, book 3:* Where my slave, while a runaway, buys something from a nonowner, I should have the Publician, even though when the thing was delivered to the slave, I did not acquire possession through him.

16 PAPINIAN, *Questions, book 10:* PAUL notes: The Publician should be barred by the defense of ownership.

17 NERATIUS, *Parchments, book 3:* The Publician action was not introduced to take the thing away from the owner. The justification for the action was first equity and then the defense "if the thing does not belong to the possessor." It aimed to insure that a party who bought something in good faith and, on that ground, acquired possession should keep it.

3

WHERE THE ACTION IS FOR VECTIGALIAN, THAT IS, EMPHYTEUTIC, LAND

1 PAUL, *Edict, book 21:* Some lands belonging to cities are called vectigalian and others are not. They are called vectigalian when they are let on perpetual leases, that is, on terms that as long as the rent-charge (*vectigal*) is paid, neither the original tenants nor their successors may be removed from the land. They are not vectigalian when they are let for cultivation in the way that private individuals normally let their own land for cultivation. 1. It is accepted law that those who take a lease of land from a municipality, to be enjoyed in perpetuity, although they do not become owners, yet have an action *in rem* against anyone who has taken possession and even against the municipality itself,

2 ULPIAN, *Sabinus, book 17:* so long, that is, as they pay the rent-charge.

3 PAUL, *Edict, book 21:* The situation is the same where land is let for a period and the period of lease has not elapsed.

BOOK SEVEN

1

USUFRUCT AND THE WAY IN WHICH A MAN MAY EXERCISE IT

1 PAUL, *Vitellius, book 3:* Usufruct is the right to use and enjoy the things of another without impairing their substance.

2 CELSUS, *Digest, book 18:* In fact, usufruct is a right over a tangible object; if that object is destroyed, the usufruct inevitably goes too.

3 GAIUS, *Common Matters or Golden Words, book 2:* A usufruct can be created over any landed estate whatever by means of a legacy in that an heir may be ordered to make over the usufruct to a particular person. He is held to do so if he takes the legatee on to the land or suffers him to use and enjoy it. If a man wants to create a usufruct other than by will, however, he can do so by means of pacts and stipulations. 1. A usufruct may be created not only over land and houses but also in slaves, beasts of burden, and other types of property. 2. However, so that bare ownership might not become altogether worthless due to a usufruct being continually outstanding, it has been settled that a usufruct may be extinguished in certain specific ways and revert to the bare ownership. 3. Moreover, a bare right of use can, in practice, be created or terminated in the same ways as is a usufruct.

4 PAUL, *Edict, book 2:* In many respects, usufruct is a fraction of ownership and stands by itself in that it can be granted so as to take effect immediately or from a future day.

5 PAPINIAN, *Questions, book 7:* At the outset, a usufruct can be created with reference to a divided or undivided share of a thing; it can also be lost in either case by the lapse of the statutory period and, on the same principle, be reduced as a result of the provisions of the *lex Falcidia.* Further, if the party who promised to grant a usufruct dies, the obligation to do so is divided in proportion to the shares held in his inheritance. If a usufruct falls to be granted over an estate which is owned in common and one of the co-owners is defendant in an action brought to enforce the obligation, satisfaction will have to be given in accordance with that defendant's share in the estate.

6 GAIUS, *Provincial Edict, book 7:* A usufruct can be created in a number of ways; for example, it may be left as a legacy. On the other hand, the bare ownership of property, under reservation of the usufruct, can be the subject of a legacy with the result that the usufruct will remain with the heir. 1. Further, a usufruct may be created in an action for dividing an inheritance or in one for dividing common property, if the judge awards the bare ownership to one party and the usufruct to the other. 2. We may acquire a usufruct not only through ourselves but also through those persons whom we have in our power. 3. Moreover, there is nothing to prevent my slave being instituted heir and the bare ownership being left by way of legacy under reservation of the usufruct.

7 ULPIAN, *Sabinus, book 17:* When a usufruct is left as a legacy, all fruits of the property concerned belong to the usufructuary. A usufruct of either immovable or movable property may be left by way of legacy. 1. When a usufruct of immovable property, for example, a house, is left as a legacy, all income from it belongs to the usufructuary, as well as whatever revenue there may be from buildings, open ground, and any other appurtenances of the house. Accordingly, it has been settled that the usufructuary may be authorized to take possession of an adjacent house on the grounds of threatened damage and that he will hold that house as owner, if the other party persists in withholding security; nor will he lose anything when the usufruct comes to an end. Similarly, Labeo states that the owner of the building is not entitled to raise it in height without your [the usufructuary's] permission, just as, when a usufruct of a tract of open ground has been left by way of legacy, a building cannot be erected on that spot. I consider this to be the correct view. 2. Therefore, as all fruits of the subject matter of the usufruct belong to the usufructuary, Celsus tells us in the eighteenth book of his *Digest* that he can also be compelled, by means of an application to the arbitrator, to repair the house, only however to this extent, that he keep it in good repair. If any part of the house should have fallen down due to its age, neither of the parties can be compelled to rebuild it; but if the heir should do so, he will have to allow the usufructuary to use it. Hence, Celsus considers the question of the extent of the usufructuary's duty to keep the house in good repair, since he cannot be compelled to rebuild what has fallen down through age. Accordingly, he tells us that the usufructuary is liable for ordinary repairs only, since, as the usufruct has been left to him by way of legacy, he assumes responsibility for other burdens as well, such as tax, tribute, ground rent or a provision for maintenance that forms a testamentary charge on the property. This is stated by Marcellus in his thirteenth book. 3. Cassius also states in the eighth book of his *Civil Law*, that by application to the arbitrator, a usufructuary can be compelled to carry out repairs, just as he can be compelled to plant trees; Aristo observes that this statement is sound. Again, Neratius tells us in the fourth book of his *Parchments* that a usufructuary cannot be prevented from carrying out repairs any more than he can be prevented from ploughing or cultivating the land; and not only may the usufructuary carry out such repairs as are necessary but also he may make decorative improvements, for example, frescoes, mosaic pavements, and the like. However, he may not enlarge a building or remove anything that is of use,

8 ULPIAN, *Edict, book 40:* even although he intends to replace it with something better. This view is the correct one.

9 ULPIAN, *Sabinus, book 17:* Similarly, if a usufruct of land is left by way of legacy, whatever is produced on the land, whatever can be taken from it, counts as fruits of the land, providing, however, that the usufructuary takes them in the way that a careful man would think right. Indeed, Celsus states in the eighteenth book of his *Digest* that he can be compelled to cultivate the land in the proper way. 1. If there are bees on the land, the legatee is also entitled to the usufruct of them. 2. If the land has stone quarries on it, and the usufructuary wishes to hew stone, or if there are chalk or sand pits on it, Sabinus holds that the usufructuary may make use of all of these as a careful head of a household would do. I consider this to be the correct view. 3. Even if these quarries were discovered after the legacy of the usufruct had been made, when the bequest consisted of the usufruct of the whole estate and not of parts of it only, they are included in the legacy. 4. Analogous to the above is a point often considered in the case of accession; and it has been settled that the usufructuary is entitled to the usufruct of alluvial accretions. However, if an island arises in a river adjoining an estate, Pegasus states that the usufruct of it does not go to the usufructuary of that estate, although it does accede to the bare ownership. He says that the island forms, as it were, a special estate, the usufruct of which does not belong to you. This opinion is not without justification: The fact is that where the increase is imperceptible, the usufruct is also increased; but, where the accretion is a clearly discernible entity, it

is not an accession from which the usufructuary may benefit. 5. Cassius states in the eighth book of his *Civil Law* that proceeds derived from fowling and hunting belong to the usufructuary; consequently, those from fishing do so as well. 6. It is my view that the fruits of a nursery belong to the usufructuary, with the result that he is permitted both to sell and plant out the seedlings. However, with a view to restocking the estate, he is obliged to keep the nursery garden prepared for use and to renew it continually, as a kind of implement for use in working the land, so that it may be returned to the owner on the expiry of the usufruct. 7. The usufructuary is entitled to the fruits of the working-plant of the estate, but he does not have the power to sell them. For if there has been a legacy of the usufruct of an estate and there is a field from which the owner was accustomed to take stakes or osiers or reeds for use on the estate, the usufruct of which was the subject of the legacy, my opinion is that the usufructuary is entitled to make use of the field, providing he sells nothing obtained from it, unless it should happen that he was left a legacy of the usufruct of the willow-plantation or the wood from which the stakes were taken or the bed of reeds; if this should be the case, he is entitled to sell. Trebatius states that the usufructuary may cut coppice-wood and reed beds just as the owner was accustomed to do, and that he may sell, even although the owner was not in the habit of doing so, but of using the stakes and reeds himself. The fact is that the matter must be considered with reference to the quantity used and not the nature of that use.

10 POMPONIUS, *Sabinus, book 5:* The usufructuary may take props and branches from trees from a coppice-wood. From a wood which is not a coppice-wood he may take what he needs for his vineyard, as long as he does not impoverish the estate.

11 PAUL, *Epitome of the Digest of Alfenus, book 2:* However, if the trees are of a considerable size, the usufructuary is not permitted to fell them.

12 ULPIAN, *Sabinus, book 17:* If trees are uprooted or brought down by the force of the wind, Labeo states that the usufructuary is entitled to remove them only for his own use and for the needs of the estate, but that he may not use the timber as fuel, if he has another source of supply of firewood. I consider this to be the correct view; for otherwise, if the whole estate should be overtaken by such a misfortune, the usufructuary could remove every tree on it. However, it is Labeo's opinion that the usufructuary can fell as much timber as is required for repairing the farm buildings, just as, he adds, he may burn lime or dig sand or take anything else which is needed for a building. 1. If the usufruct of a ship has been left as a legacy, it is my opinion that it can be sent on a voyage, even although there may be some danger of shipwreck; the fact is that a ship is constructed so that it may be put to sea. 2. The usufructuary can either enjoy the subject matter of the usufruct himself or grant the enjoyment of it to another, or he can let for hire or sell the enjoyment; for a man who lets is making use of his right, as is one who sells. Further, if the usufructuary grants the enjoyment to another by way of *precarium*, or makes a gift of it, I consider that he is exercising his right and thus retains his usufruct. This was the opinion which was given by Cassius and Pegasus, and which is approved by Pomponius in the fifth book of *Sabinus*. Indeed, not only do I retain my usufruct if I let it for hire myself, as Julian states in the thirty-fifth book, I retain my usufruct even if someone who is administering my affairs without authorization lets it. What, however, if I do not let the usufruct for hire, but in my absence and without my knowledge, a person who is administering my affairs in this way makes use of it and takes the produce? I retain the usufruct as before, by reason of the fact that I have acquired a right of action for unauthorized administration, a conclusion that has the support of Pomponius in the fifth book. 3. Pomponius expresses doubt over the following point. Suppose a runaway slave in whom I have a usufruct should stipulate for something in connection with my property or take delivery of something. Do I retain my usufruct in him by virtue of this fact, on the grounds that I am thereby making use of him? Pomponius is inclined to the view that I do. He points out that it is often the case that even although we do not make use of slaves on the spot, we still retain our usufruct in them, as, for example, where a slave is ill or is an *infans* whose services are worthless or a man worn out through old age; and cer-

tainly, we retain our usufruct if we plow a field, even although it is so barren that it yields no crops. Julian, however, states in the thirty-fifth book of his *Digest* that even if the runaway slave makes no stipulation at all, the usufruct in him is still retained. As he says, on the principle that possession is retained by an owner, even if the slave has fled, so on the same principle, a usufruct may be retained too. 4. The same author discusses the following point. Suppose someone else acquires possession of the slave, is it the case that just as the slave ceases to be possessed by the bare owner, the usufruct is also lost in these circumstances? First of all, he does, in fact, say that it may be held that the usufruct is lost; but even if this is the case, it must nevertheless be held that anything that the slave may have stipulated for in connection with the property of the usufructuary within the prescribed period is acquired for the usufructuary. This may be said to infer that the usufruct is not lost, even if the slave is in the possession of another, provided that he does stipulate for something on my behalf; and it makes little difference whether he is in the possession of the heir or of someone to whom the inheritance has been sold or to whom the bare ownership has been left by legacy or even of a despoiler. It is enough for the purposes of the retention of the usufruct that the usufructuary should have the intention to retain and that the slave should do some act in the name of the usufructuary. This opinion seems sound. 5. Julian, in the thirty-fifth book of his *Digest*, discusses the following point. Suppose a thief picks or cuts down ripe fruits which are still attached to the parent plant. Who has the *condictio* against him, the owner of the land or the usufructuary? Julian's opinion is as follows. As fruits do not become the property of the usufructuary unless he gathers them himself, and that even although someone else should separate them from the land, the better view is that the *condictio* lies to the bare owner, but that the usufructuary has the action for theft, because he had an interest in the fruits not being removed. Marcellus, however, is struck by the consideration that if the usufructuary subsequently gets hold of the fruits in question, it may be that they become his property. And if they do, how can one explain this result other than in the following way: that in the interim the fruits belong to the bare owner and that as soon as the usufructuary gets hold of them, they become his property? This case is analogous to that of an object left as a legacy subject to a condition; during the pendency of the condition, it belongs to the heir, but as soon as the condition is fufilled, it passes to the legatee. The truth of the matter is that the *condictio* lies to the bare owner. However, whenever the ownership is in suspense (as Julian himself says it is in the case of the young of animals which are reared as replacements and in the case of something, delivery of which has been taken by a slave held in usufruct for which the price has not yet been paid but for which he has given security) it must be said that the right to bring the *condictio* is in suspense and that the right of property is even more so.

13 ULPIAN, *Sabinus, book 18:* If the usufruct of anything is left by way of legacy, the bare owner can require that security be given in respect of that thing, and this may be done by order of the judge. The fact is that just as the usufructuary is entitled to the use and enjoyment of the property, so the bare owner is entitled to be secured in respect of his ownership. Julian, in the thirty-eighth book of his *Digest*, confirms that this applies to every case of usufruct. Where there is a legacy of a usufruct, the usufructuary should not be granted an action for it until he has given security that he will use and enjoy the property in the way that a careful man would think proper; and if there are several heirs who are charged with the usufruct, security should be given to each of them individually. 1. Consequently, whenever an action is brought with reference to a usufruct, not only is judgment given on the basis of what has already been done; it also involves instructions as to how the usufruct should be exercised in the future. 2. In respect of damage already done, the usufructuary is also liable under the *lex Aquilia* and the interdict against force or stealth can also be brought against him, as Julian points out. In fact, there is no doubt that the usufructuary is liable to the aforesaid actions and, indeed, to those for theft as well, just like any other person who commits an offense of this kind against the property of another. Consequently, Julian was asked what was the good of the praetor's promising an action, when a right

of action already existed under the *lex Aquilia*. His reply was that as there are cases which do not come within the scope of the Aquilian action, so, for this reason, a judge is appointed so that the usufructuary might exercise his usufruct in accordance with his decision; for instance, a man who fails to plow up an unbroken piece of land, or to plant vines, or who allows a watercourse to fall into disrepair is not liable under the *lex Aquilia*. The same rules apply in the case of a man who has a right of use. 3. If a dispute arises between two usufructuaries, Julian holds in the thirty-eighth book of his *Digest* that the fairest solution is that they should be granted an action analogous to the action for dividing common property, or that by means of stipulation, they should give mutual undertakings as to the way in which they will exercise their respective usufructs. As Julian says, why should the praetor allow the parties to reach the stage of an armed quarrel, when he has the power to settle their differences by exercising his jurisdiction? This opinion also has the approval of Celsus in the twentieth book of his *Digest*, and I consider it to be sound. 4. The usufructuary must not make the position of the bare owner worse, but he is free to improve it. If the usufruct of an estate is left by way of legacy, the usufructuary must not cut down fruit trees or demolish farm buildings or do anything else to the detriment of the interests of the bare owner. If the estate should happen to be one used for pleasure and to have on it pleasure gardens, drives, or pleasant and shady walks laid out under trees which do not bear fruit, the usufructuary must not pull them down to make, for example, a vegetable garden or anything else designed to produce a profit. 5. May the usufructuary himself open stone quarries or chalk or sand pits? My opinion is that he is indeed entitled to do so, providing he does not appropriate for this purpose a part of the land required for something else. Accordingly, he can search for sites suitable for quarries and other similar mining operations; therefore, he can either work such mines of gold, silver, sulphur, copper, iron, or other minerals as were opened by the owner, or he can open such mines himself, providing this does not prejudice the cultivation of the land. If it should happen that the income from a mine he has opened should exceed that from the vineyards, plantations, or olive groves which were already there, he may perhaps be allowed to cut these down, since he is free to improve the position of the bare owner. 6. However, if the operations begun by the usufructuary should pollute the atmosphere of the land or are likely to require a large team of laborers, pickers, or the like, so that the innovations are more than the bare owner can sustain, the usufructuary will not be held to be exercising his right as a careful man would do. Nor is the usufructuary permitted to erect a building on the land, unless it is one required in connection with the harvest. 7. If the usufruct of a house is left as a legacy, Nerva the Younger tells us that the usufructuary is allowed to put in windows. He may also paint the walls and add frescoes, marble slabs, statuettes, and anything else designed to improve the appearance of the house. However, he is not permitted to alter the rooms or throw them together or divide them or to reverse the front and back entrances or to open up retreats or to alter the entrance hall or to change the layout of the pleasure gardens. In short, the usufructuary can improve what he finds, so long as he does not change the character of the house. Again, Nerva tells us that a man to whom the usufruct of a house has been left may not raise it in height, even although this does not involve the obstruction of light, because the roof is more likely to be disturbed; and Labeo states that this rule also applies to the bare owner. Nerva adds that the usufructuary may not block up windows. 8. Again, if there is a legacy of the usufruct of a dwelling house, the usufructuary must not let out rooms in it, or divide the building up into separate apartments; he may, however, let it for hire, but he must let it as a house. Nor is he allowed to set up a public bath on the premises. As to the statement that the usufructuary must not let out rooms in the house, this must be taken to apply to what are commonly referred to as travelers' lodgings or fullers' workshops. Suppose that there is a bath in the house which is ordinarily available for the use of the owner's household and which is situated in the innermost part of the house or among pleasant rooms. My opinion is that the usufructuary would not be acting properly or in accordance with the standards of a careful man if he were to start to let it for hire for public use, any

more than if he were to let the house as a place to keep beasts of burden or if he let as a bakery a building which served the house as a stable and coach house,

14 PAUL, *Sabinus, book 3:* even although he would derive considerably less profit from the property.[1]

15 ULPIAN, *Sabinus, book 18:* If, however, the usufructuary builds any addition to the house, he cannot thereafter take it down or detach it; but if anything is detached, he can certainly lay claim to it as owner. 1. If the usufruct left as a legacy is one of slaves, the usufructuary must not put them to a wrong use; his use of them must correspond to their respective characters. For example, if he sends a scribe into the country and makes him carry a basket of lime, or if he makes an actor do the work of a bath attendant or a singer perform the duties of a household servant or if he takes a man from the wrestling arena and sets him to clean out the latrines, he will be held to be making a wrong use of the property of the bare owner. 2. He must also provide the slaves with sufficient food and clothing, each according to his rank and worth. 3. Labeo states as a general rule that in the case of movable property of every kind, the usufructuary is bound to observe due moderation, so as not to spoil it by rough or harsh usage; indeed, if he does not, the Aquilian action can be brought against him. 4. If the usufruct of clothing is left as a legacy and the legacy is not one of the usufruct of a quantity, the rule is that the usufructuary must make use of it in such a way that it will not wear out; but he cannot let it for hire, as a careful man would not make use of it in this way. 5. Similarly, if the usufruct of theatrical costumes or hangings or equipment of some other kind is left by way of legacy, the usufructuary may not make use of them anywhere but on the stage. It is, however, worth considering whether he can let such items for hire. My opinion is that he may do so. And even if it was the practice of the testator to lend them for use and not to let them for hire, I still think that the usufructuary may let theatrical costumes for hire, as he may funeral attire. 6. The bare owner must not hinder the usufructuary in the exercise of his right, lest he make the latter's position worse.[2] In connection with certain articles, the following doubt has arisen: If the bare owner forbids the usufructuary to use them, is he acting within his rights? For example, suppose he forbids him to use storage jars, when the usufruct of an estate has been left as a legacy. Some authorities hold that even if the jars are let into the ground, their use can be prohibited; they take the same view in the case of vats, barrels, small jars, and pitchers, and also in the case of windowpanes, where the legacy is one of the usufruct of a house. However, my own view is that unless there is evidence of an intention to the contrary, the equipment of the estate or house is also included. 7. The bare owner cannot impose a servitude on the land, nor may he allow one to be lost, although, as Julian tells us, he can certainly acquire a servitude, even against the wishes of the usufructuary. Consequently, the usufructuary cannot acquire a servitude for the land, although he can keep one up; and if it should happen that a servitude is lost through nonuse on the part of the usufructuary, he will be liable to an action on that count. The bare owner cannot impose a servitude on the land, even if he has the consent of the usufructuary,

16 PAUL, *Sabinus, book 3:* unless it is one which does not prejudice the position of the usufructuary, as, for example, where the bare owner grants a servitude to a neighbor to the effect that he personally shall not have the right to build higher.

17 ULPIAN, *Sabinus, book 18:* With the consent of the usufructuary, the bare owner can make ground religious. This is permitted out of respect for religion. Indeed, in some instances, the bare owner can make ground religious even without such consent, for example, where he buries the body of the testator in it, when there is no other place where he could be so conveniently interred. 1. As a result of the rule that the bare owner must not make the position of the usufructuary worse, it is often asked whether the owner of a slave [in whom someone else has a usufruct] can punish him. Aristo states in an annotation to

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1. Or perhaps, "even although he would derive considerably less profit from such a venture." The phrase is somewhat ambiguous. It may mean that the usufructuary's profit is less as a result of his hiring, or, alternatively, that it is less as result of his not hiring.

2. Or perhaps "as long as the usufructuary does not use the thing in a way that will make the position of the bare owner worse." The Latin is ambiguous.

Cassius that he has full powers of correction, provided he acts without malicious intent [toward the usufructuary], and this, notwithstanding that the usufructuary has no right to spoil the slave's skills, by putting him to unsuited or unaccustomed tasks or to disfigure him with scars. 2. The owner can, however, noxally surrender the slave, if he does so without malicious intent, since the rule is that noxal surrender does not terminate a usufruct, any more than does the acquisition of ownership by usucapion, when this takes place after a usufruct has been created. But an action on the usufruct should not be granted if the usufructuary does not tender the amount at which damages were assessed in the noxal action to the party who received the slave in noxal surrender. 3. Should someone kill the slave, I have never been in any doubt that an *actio utilis* on the analogy of the Aquilian action should be granted to the usufructuary.

18 PAUL, *Sabinus, book 3:* If the usufruct of land is left as a legacy, new trees must be planted to replace any that have died, the old ones becoming the property of the usufructuary.

19 POMPONIUS, *Sabinus, book 5:* Proculus is of the opinion that a tenement property can be left as a legacy[3] in such a way as to subject it to a servitude in favor of another tenement property belonging to the inheritance in the following terms: "If 'X' makes a promise to my heir that it will not be his fault if certain buildings are raised in height, then I give and bequeath to him the usufruct of those buildings"; or alternately: "I give and bequeath to 'X' the usufruct of such and such a house, so long as it is not raised above its present height." 1. If trees are torn down by the force of the wind and the owner does not remove them with the result that this proves detrimental to the exercise of a usufruct in the land or to the use of a pathway over it, the usufructuary should proceed against him by the appropriate action.

20 ULPIAN, *Sabinus, book 18:* If a man frames a legacy in the following terms: "I give and bequeath the annual fruits of the Cornelian estate to Gaius Maevius," these words should be construed as amounting to a legacy of the usufruct of the estate.

21 ULPIAN, *Sabinus, book 17:* When the usufruct of a slave has been left as a legacy, whatever the slave acquires through his own services or in connection with the property of the usufructuary belongs to the latter, whether the slave stipulates or takes delivery of possession. However, if the slave is instituted as an heir or receives a legacy, Labeo draws a distinction, the point of distinction being for whose sake he is instituted heir or receives the legacy.

22 ULPIAN, *Sabinus, book 18:* Again, what is the rule if a gift is made to a slave in whom someone has a usufruct? In all such cases, if something is left or given to the slave out of consideration for the usufructuary, the slave will acquire for him; if it was out of consideration for the bare owner, the slave will acquire for him; if it was out of consideration for the slave himself, he will acquire for his owner, and no account is taken of how or through whose offices the donor or testator came to know the slave. Further, if a slave held in usufruct receives something owing to the fulfillment of a condition, and it is established that the condition was written in out of consideration for the usufructuary, the rule is that what he receives is acquired for the latter; for the same rule applies in the case of a *mortis causa* gift.

23 ULPIAN, *Sabinus, book 17:* Just as the slave by stipulating acquires for the usufructuary so, as Julian tells us in the thirtieth book of his *Digest*, he can acquire a defense for the usufructuary by making a pact. Julian also tells us that by securing a formal release, the slave can obtain a discharge for the usufructuary. 1. As we have already stated that whatever is acquired from the slave's services belongs to the usufructuary, it should also be borne in mind that the slave can be compelled to work. In fact, according to an opinion of Sabinus, the usufructuary is entitled to reasonable chastisement although, as Cassius tells us in the eighth book of his *Civil Law*, he may not torture the slave or flog him.

24 PAUL, *Sabinus, book 10:* If a man, who intends to make a gift to a usufructuary, makes a formal promise by means of a stipulation with a slave who is included in the usufruct, he will be contractually bound to the usufructuary himself. The reason is that it is customary for a slave in this position to be able to make a stipulation for the benefit of the usufructuary.

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3. Or perhaps, "a usufruct of a tenement property can be left as a legacy."

ULPIAN, *Sabinus, book 18:* Moreover, if a man stipulates for something for himself or for Stichus, a slave held in usufruct, with the intention of making a gift, as his wish is that it should go to the usufructuary, the rule is that if the payment is made to the slave, it is acquired for the usufructuary. 1. In some instances, however, the question for whom a slave thus held in usufruct aquires remains in suspense. For example, suppose the slave has purchased and taken delivery of another slave and, as yet, has not paid the purchase price, but has only given security for it, to whom does the slave purchased belong in the meantime? Julian states in the thirty-fifth book of his *Digest* that the ownership of the slave is in suspense and that the payment of the purchase price will determine to whom he belongs; and if payment is made out of assets belonging to the usufructuary, the slave will belong to the latter, with retroactive effect. The same rule applies if, to take another example, the slave makes a stipulation for the repayment of money which he is about to advance; in this case, the actual advance will determine who has acquired the benefit of the stipulation. Thus, we have established that the ownership is in suspense until the price is paid. What, then, if the price is paid after the usufruct has come to an end? Julian, in the thirty-fifth book of his *Digest*, holds that the decisive question is still that of the origins of the money which was paid over. On the other hand, Marcellus and Mauricianus take the view that if the usufruct has been lost, the ownership is acquired for the bare owner. The opinion of Julian is, however, the more equitable. Should the price be paid out of the assets of both parties, the view expressed by Julian is that the ownership will go to both of them, that is to say, proportionally, in accordance with their respective contributions toward the purchase price. Suppose, however, that the slave makes payment in full on one and the same occasion out of the assets of each of them; for example, suppose he was obliged to pay ten thousand as the purchase price and that he paid over ten thousand out of the assets of each. For which of them does the slave actually acquire? If he makes payment by counting out the money, the question turns on whose coins he pays over first; as for the coins paid over subsequently, the other party can bring an action to recover them, while, if they have been spent by the recipient, it is a case for a *condictio*. If, however, the slave puts the whole amount in a bag and hands this over in payment, he does not make the payee owner of anything, and so ownership of the thing purchased is not, as yet, held to have been acquired for anyone. The reason is that where the slave pays an amount in excess of the agreed price, he does not make the recipient owner of the coins. 2. Suppose a slave held in usufruct hires out his services and stipulates for a fixed sum to be paid every year. The rights flowing from this stipulation, insofar as they relate to the years during which the usufruct lasts, will be acquired for the usufructuary; but as regards the ensuing years, the rights flowing from the stipulation will inure to the benefit of the bare owner, even although they were acquired by the usufructuary at the outset. This is the case, despite the fact that as a rule, rights under a stipulation, once acquired by one person, cannot pass to another, unless that other is his heir or *adrogator*. Similarly, suppose the usufruct of a slave has been left as a legacy from year to year, a year at a time, and that the slave hires out his services and stipulates as outlined above; every time the usufruct is lost owing to a change in the civil status of the usufructuary and is subsequently recovered, the benefit of the rights arising from the stipulation will shift and, after passing to the heir, it will return to the usufructuary. 3. It is a matter for discussion, whether what cannot be acquired for the usufructuary is acquired for the bare owner. Julian tells us in the thirty-fifth book of his *Digest* that what cannot be acquired for the usufructuary goes to the bare owner. He also tells us that a slave who makes a stipulation founded on the property of the usufructuary, but expressly for or by order of the bare owner, will acquire for the latter. On the other hand, if the slave makes a stipulation for the usufructuary which is not founded on the usufructuary's property, nor is in connection with his own services, the stipulation is ineffectual. 4. If a slave held in usufruct stipulates for a conveyance of the usufruct in him, either without naming any particular person or expressly in the name of his owner, he will acquire for the latter. This case is analogous to that of a slave owned by two persons in common, who achieves nothing if he stipulates on behalf of one of his owners for something which already belongs to that owner, since a stipulation made by a man for something which is already his property is void; however, if the slave stipulates [for the same thing] on behalf of his other owner, he acquires the whole for him. 5. In the same book, Julian tells us that if the usufructuary hires out the slave's services to the slave himself, this is ineffectual. Indeed, as he says, if a slave makes a stipulation with me which is founded on my own property, he achieves nothing, just as another man's slave who is serving me in good faith acquires nothing

for his owner, if he does the same thing. Similarly, he says, even if the slave hires my own property from me, the usufructuary, I shall not be contractually bound. Indeed, the general rule that Julian lays down is as follows: If a slave would acquire something for me, were he to stipulate for it with a third party, a stipulation made with me for the same thing is ineffectual, unless, of course, as Julian adds, he stipulates with me or hires from me expressly on behalf of his owner. 6. Suppose that there are two usufructuaries [of the same slave] and that the slave makes a stipulation founded on the property of one of them. Does that one acquire the whole benefit of the contract or a share of it only in proportion to his share in the usufruct? The same question is discussed by Scaevola in the second book of his *Questions* with reference to the case of two possessors in good faith. He states that it is generally held, and not unreasonably so, that if the slave makes a stipulation founded on the property of one of them, a part is acquired for that one only and a part for the owner; however, if the slave stipulates in express terms, there should be no doubt that when the name of one of the parties is mentioned, that one acquires the whole. He adds that the rule is the same if the slave stipulates on the orders of one of them, since an order is understood to be the equivalent of an express mention. The same rule also applies to the case of the usufructuaries, so that in any case in which the usufructuary acquires less than the whole, there will be an acquisition for the bare owner; we have already shown that the latter can acquire through the property of the usufructuary. 7. With regard to the statement that the usufructuary can acquire [through a slave held in usufruct] by a title founded on his own property or on the services of the slave, the following point should be considered. Does this only apply where the usufruct is created by virtue of a legacy, or does it also apply where the usufruct is created by delivery, stipulation, or in any other way? The opinion of Pegasus, which is followed by Julian in the sixteenth book, is the correct one, namely, that a usufructuary can acquire in this way, no matter how his usufruct was created.

26 PAUL, *Sabinus, book 3:* If a slave held in usufruct hires out his services and, before the expiry of the period agreed on for the hire, the usufruct comes to an end, the remainder of the term enures to the benefit of the bare owner. Again, if at the outset the slave stipulates for a fixed sum as the return for the performance of predetermined services, the same rule applies if the usufructuary undergoes a change of civil status.

27 ULPIAN, *Sabinus, book 18:* Should the testator leave fruit that has already ripened hanging on the trees, the usufructuary may take it if he found it still hanging there when the legacy vested; for the usufructuary is entitled even to standing crops. 1. If it was the practice of the owner to use shops for the sale of his merchandise or for the purposes of conducting a business, the usufructuary is certainly permitted to let them for hire, even for the sale of merchandise of a different kind. The only restriction that has to be observed is this: The usufructuary must not destroy the character of the property by improper use or exercise his usufruct in an insulting or outrageous way. 2. Suppose that the legacy bequeathed is that of the usufruct of a slave, whom the testator was accustomed to employ, if I may use the phrase, for unproductive tasks. If the usufructuary gives him an education or teaches him a skill, he can make use of the skill or knowledge thus imparted. 3. If anything is owing by way of sewage charges or if anything has to be paid for the channel of an aqueduct, which crosses the land, this falls to be borne by the usufructuary. Again, if anything is due by way of a contribution for the upkeep of a roadway, my opinion is that the usufructuary will have to meet this expense too. Consequently, if anything has to be contributed from the profits of land on the occasion of troops passing or if anything is owing to the municipal authorities, these are liabilities which the usufructuary will have to bear. (As a matter of fact, occupiers of land generally sell a fixed portion of the fruits of their land to the municipal authorities at a low price, and they often pay taxes due to the imperial treasury in the same way.) 4. If the land has, in any way, been subjected to a servitude, the usufructuary will be obliged to tolerate it; consequently, if, as the result of a stipulation, an obligation to create a servitude exists, my opinion is that the same rule applies. 5. Suppose a slave has been purchased under a condition, fortified by a penalty, that he should not be used for certain, specified types of work. If a usufruct of that slave is left as a legacy, is the usufructuary bound to observe this restriction? My opinion is that he must do so; otherwise, he would not be exercising his usufruct in the way that a careful man would think proper.

28 POMPONIUS, *Sabinus, book 5:* Old gold and silver coins, which are ordinarily used as jewelry, can be the subject of a legacy of a usufruct.

29 ULPIAN, *Sabinus, book 18:* Celsus, in the thirty-second book of his *Digest*, and Julian, in the

sixty-first book of his *Digest*, both tell us that a usufruct of the whole of a man's possessions can be left as a legacy, providing this does not exceed three quarters of the appraised value of the inheritance; and this is the better view.

30 PAUL, *Sabinus, book 3:* If a man who has two houses leaves the usufruct of one of them by way of legacy, Marcellus tells us that his heir may block out its light by raising the height of the other house, since it is possible to live in a house, even if it has been darkened. This rule must be taken as governed by the following qualification: The house must not be put in total darkness, but must retain a moderate amount of light, such as is sufficient for the needs of the inhabitants.

31 PAUL, *Sabinus, book 10:* The term "in connection with the property of the usufructuary" is understood to mean anything that the usufructuary gives or grants to [a slave held in usufruct] or any gain that the slave makes through the administration of the usufructuary's affairs.

32 POMPONIUS, *Sabinus, book 33:* If a man conveys a house, which is the only one he has, or an estate, he may reserve a servitude which is personal and not praedial, for example, a right of use or a usufruct. Again, if he reserves a right of pasture or a right of habitation, such a reservation is valid, as fruits are often taken from mountain pastures by means of pasturing cattle on them. In the case of a reservation of a right of habitation, whether this be for a limited period or until the death of the man who made the reservation, it is held that this amounts to the reservation of a right of use.

33 PAPINIAN, *Questions, book 17:* If the usufruct is left as a legacy to Titius and the bare property to Maevius, and Titius dies during the lifetime of the testator, nothing is left in the hands of the heir named in the will. Indeed, Neratius himself gave an opinion to this effect. 1. It is agreed that in certain circumstances, a usufruct is not treated in law in the same way that a part of the thing is treated. Thus, suppose proceedings are brought for a portion of an estate or of a usufruct and that the decision goes against the claimant; and suppose that after this, an action is brought to claim a further portion, which has been added by accrual; Julian tells us that in the action for the property, the defense of *res judicata* will prevail, but that this will not be the case in the action for the usufruct, since the additional portion of the land—for example, an alluvial increment—would accrue to the original part, but the additional portion of the usufruct would accrue to the person.

34 JULIAN, *Digest, book 35:* Whenever a usufruct is left as a legacy to two men on the terms that they are to have the exercise of it during alternate years, then, if the legacy is framed in the words "to Titius and Maevius," it can reasonably be held that it is given to Titius for the first year and to Maevius for the second. But if the two legatees bear the same name, and the legacy is couched in the terms, "I give the usufruct to the two Titii, for alternate years," then, unless the parties reach agreement as to which of them is to exercise it first, they will constitute a hindrance to each other. However, if Titius acquires ownership of the property during a year in which he has the enjoyment of the usufruct, he will not have, for the present, the separate usufruct which was left to him, although Maevius will still be entitled to the usufruct every other year. But if Titius subsequently disposes of the property, he will again have his usufruct, because even if a usufruct was left to me by a legacy subject to a condition and, during the pendency of the condition, I acquired the ownership of the property concerned from the heir but, while the condition was still unfulfilled, I alienated the property, I would be allowed to take under the legacy. 1. Suppose you have left the usufruct of a farm to your agricultural tenant by way of legacy. He can bring an action to claim the usufruct, and he can also institute proceedings on the lease against your heir, the result of which will be that he will not have to pay rent and that any expenses he has incurred in connection with the cultivation of the land will be reimbursed. 2. The question whether a usufruct which is left as a legacy is a usufruct of the whole of a man's property or of individual items, matters, I think, to the following extent. If a house is burned down, an action for the usufruct of the house, if such was the legacy, cannot be brought; but if the legacy was one of a usufruct of the whole of the testator's property, an action will lie for the usufruct of the vacant site. The reason is that a man who leaves a legacy of the usufruct of

his property is held to bequeath the usufruct not only of those things which have a specific form but also of his whole substance, and the site of a house is part of that substance.

35 JULIAN, *Urseius Ferox, book 1:* If a usufruct has been left as a legacy, but the heir named in the will delays his acceptance of the inheritance because of this, so that the acquisition of the legacy is delayed, then, as Sabinus holds, the loss sustained by the usufructuary will have to be made good. 1. I was left a legacy of the usufruct of a slave, the instructions being that on the termination of my usufruct, the slave was to be free. I subsequently accepted from the heir a sum of money, estimated to be the equivalent of the legacy. The opinion given by Sabinus was that the slave would not acquire his freedom as a result of this, because by accepting something else in place of the slave, I could be said to be exercising my usufruct in him; and the provision governing the slave's acquisition of freedom would remain the same as before, so that he would become free on my death or in the event of a change of my civil status.

36 AFRICANUS, *Questions, book 5:* A man first of all made a legacy of the usufruct of a tract of vacant ground and then built a block of flats on it. After this, while he was still alive, the flats collapsed or were burned down. The authority consulted held that the usufruct was outstanding. On the other hand, the same rule would not apply if the usufruct of the block of flats had been left by way of legacy and the place was first of all made into a vacant site and then into flats again. The result would be the same as that in the case last mentioned, if there was a legacy of a usufruct of goblets and these were afterward reduced to a lump of metal and this was again fashioned into goblets; for even if the original character of the goblets was thus restored, they would still not be the actual goblets, which were the subject of the legacy of the usufruct. 1. I stipulated with Titius for the conveyance to me of the Cornelian estate, under reservation of the usufruct. Titius then died. "What," it was asked, "is his heir bound to give me?" The opinion given was that the answer depended on the intention with which the reservation of the usufruct was made. If the actual agreement was that the usufruct was to attach to the person of an undetermined individual, the heir will be obliged to convey the bare ownership only. If, however, it was agreed that the usufruct was to be reserved for the promisor and for him alone, his heir must give ownership with full rights. That this is in fact so appears more clearly in the case of a legacy: If an heir, who is charged with a legacy of the bare ownership, under reservation of the usufruct, dies before proceedings are instituted with reference to the will, there is even less room for doubt that his heir [the heir of the heir charged with the legacy] will be obliged to convey the ownership with full rights. The same rule applies if a legacy is made in similar terms, but subject to a condition, and the heir dies during the pendency of that condition. 2. The usufruct of a slave was left as a legacy to Titius. While the heir was in default for not giving effect to the legacy, the slave died. The authority consulted holds that the only conclusion possible is that the obligation of the heir is to be measured with reference to an amount, corresponding to the interest that the legatee had in there being no delay; that is to say, the value of the usufruct should be appraised from the day on which the heir was first in default to the day on which the slave died. It also follows from this that if Titius himself should die, an amount, based on the appraised value of the usufruct from the day when the default began down to the day of Titius's death, would likewise have to be given to his heir.

37 AFRICANUS, *Questions, book 7:* Suppose I stipulate with you for a usufruct to be granted to me for the next ten years. If you default in making the grant and five years pass, what is the legal position? Again, suppose I stipulate with you for the services of Stichus to be granted to me for the next ten years, and, as before, five years go by; what is the position? The answer given was that there was a good right of action for both the usufruct and the services with reference to the period of time which you allowed to elapse without the grant being made.

38 MARCIAN, *Institutes, book 3:* A usufructuary is not considered to be using the subject matter of his usufruct unless either he makes use of it himself or someone else does so in his name, for example, a purchaser, a hirer, a donee, or a man who is administering the usufructuary's affairs without authorization. But the following distinction falls to be drawn: If I sell [the enjoyment of] my usufruct, then, even if the purchaser does not make use of the property concerned, I am still held to retain the usufruct.

39 GAIUS, *Provincial Edict, book 7:* The reason is that the man who enjoys the purchase price is considered as having the usufruct just as much as the man who uses and enjoys the actual subject matter of the usufruct.

40 MARCIAN, *Institutes, book 3:* However, if I make a gift of the enjoyment of the usufruct, I no longer retain it, unless the donee makes use of the property concerned.

41 MARCIAN, *Institutes, book 7:* The better opinion is that it is possible to leave as a legacy the usufruct of statues and paintings, because even objects such as these can be used to some advantage, if

displayed in a suitable place. 1. Although there are some estates which are a source of expense rather than of profit, still a usufruct of such an estate can be left as a legacy.

12 FLORENTINUS, *Institutes, book 11:* If a legacy of the right of use of something is left to one man and the right to the fruits of the same thing to another, the fructuary will get what remains after the legitimate requirements of the usuary have been satisfied; and he will also be entitled to use the property for the purpose of taking the fruits. 1. It makes a difference whether a usufruct left to you by way of legacy is one of the testator's property or of the monetary value thereof. If the legacy is one of the usufruct of the property, you will have the usufruct of what remains of that property after the deduction of any article that was left to you, over and above the usufruct. If, however, the legacy is one of the usufruct of the monetary value of the property, the valuation thereof will include the value of any article left to you in addition to the usufruct. The fact is that a testator who bequeaths the same thing more than once does not increase the legacy; but once an article has been bequeathed, it is possible to increase the legacy by bequeathing the estimated value of it as well.

13 ULPIAN, *Rules, book 7:* Even a share of a man's property can be the subject of a legacy of a usufruct. If no express mention is made of the size of the share, it is taken to be a half share of the property.

14 NERATIUS, *Parchments, book 3:* The usufructuary is not entitled to replaster walls which have been left in a rough condition, because even although he would make the position of the owner better by improving the building, he still cannot do this by virtue of his rights as usufructuary. It is one thing for him to maintain what he has received and another to make some alteration.

15 GAIUS, *Provincial Edict, book 7:* Just as it is the duty of a man, who has the usufruct of a slave, to meet the expenses of feeding him, so it is clear that, as a matter of course, expenses occasioned by the slave's illness must also be met by him.

16 PAUL, *Plautius, book 9:* Suppose that in a will a stranger to the family is appointed heir, that an emancipated son is passed over, and that the ownership of the estate, under reservation of the usufruct, is left to the mother of the deceased. If proceedings for *bonorum possessio contra tabulas* are brought to a successful conclusion, then, in deference to the respect due to a parent, the full ownership must be given to the mother. 1. Suppose a testator leaves instructions that his heir is to repair a tenement property, the usufruct of which he has left as a legacy. The usufructuary can bring an action on the will to compel the heir to carry out the repairs.

17 POMPONIUS, *From Plautius, book 5:* Suppose, however, that the heir has failed to carry out the repairs and that the usufructuary has been unable to derive any benefit from his usufruct because of this. The heir of the usufructuary will have a right of action on these grounds, damages being based on the difference it would have made to the usufructuary, if the heir had not failed to attend to the repairs; and this, even although the usufruct has come to an end on the death of the usufructuary.

18 PAUL, *Plautius, book 9:* Suppose that while the usufructuary is absent, the heir attends to repairs, acting as an unauthorized administrator of the former's affairs. He will have the action for unauthorized administration against the usufructuary, even although he had in mind his own future advantage. However, if the usufructuary is prepared to relinquish the usufruct, he cannot be compelled to carry out repairs, and he is freed from liability to the action for unauthorized administration. 1. It is agreed that coppice, even if cut out of season, counts as being among the fruits of the land, just as olives gathered before they are ripe or hay which is made at the wrong time of year are classed as fruits.

19 POMPONIUS, *Plautius, book 7:* If you and I are left a legacy of a usufruct at the charge of Sempronius and Mucius, who are the heirs, I shall be entitled to a fourth part of the whole out of the share of Sempronius and a further fourth part out of the share of Mucius; similarly, you will be entitled to two quarters, taken from their respective shares.

50 PAUL, *Vitellius, book 3:* Titius left the Tusculan estate to Maevius, subject to a *fideicommissum*, requiring him to afford Titia a usufruct of half of the said estate. Maevius rebuilt a farmhouse which had fallen into disrepair through age, but which was needed for the collection and storage of crops. Is Titia obliged to assume liability for a share of the expenses incurred in proportion to her usufruct? Scaevola's opinion was that if Maevius had been forced to rebuild before the usufruct was given, he could not be compelled to give effect to the *fideicommissum* except on the terms that this expense be taken into account.

51 MODESTINUS, *Distinctions, book 9:* A legacy of a usufruct to Titius "when he dies" is held to be invalid, as it is made to depend for its effect on the very time at which a usufruct ceases to belong to a man.

52 MODESTINUS, *Rules, book 9:* If a usufruct is left by way of legacy and the property concerned is subject to taxes, there is no doubt that the usufructuary must pay them, unless it is proved that the testator directed, by means of an express *fideicommissum*, that these charges too should be paid by his heir.

53 JAVOLENUS, *Letters, book 2:* If a man is left the usufruct of a block of flats by way of legacy, then, as long as any part of the block remains standing, he retains his usufruct of the entire site.

54 JAVOLENUS, *Letters, book 3:* The usufruct of an estate was left to Titius by a legacy subject to a condition and at your charge as heir. You sold and conveyed the estate to me under reservation of the usufruct. If the condition is not fulfilled, or if it is fulfilled and the usufruct expires, to whom does the usufruct belong? The authority consulted answered as follows. I understand your question to concern the usufruct that was the subject of the legacy. Accordingly, if the condition governing the legacy is fulfilled, there is no doubt that the usufruct in question will belong to the legatee; and if he should by any chance have lost it, it will revert to the ownership of the estate. But if the condition is not fulfilled, the usufruct will belong to the heir, subject to the application, with reference to the heir, of all the rules which govern the loss of usufruct and which are ordinarily observed. However, in a sale of this kind, one must consider the terms of the agreement between the buyer and the seller, so that if it is evident that the usufruct in question was reserved on account of the legacy, then even if the condition is not fulfilled, the usufruct ought to be given to the buyer by the seller.

55 POMPONIUS, *Quintus Mucius, book 26:* Suppose there is a legacy of the right of use only of an infant slave; even although the right is worthless for the time being, still, as soon as the child progresses beyond the age of infancy, it begins to be operative.

56 GAIUS, *Provincial Edict, book 17:* The question was asked whether an action in respect of a usufruct should be granted to a municipality. The point was that there seemed to be a danger here that the usufruct would become perpetual, because it would not be terminated by death and not readily by a change of civil status; the result of this would be that the bare ownership would become worthless, owing to the usufruct being forever outstanding. Nevertheless, the rule is that such an action should be granted. In consequence of this, a further doubt arises: For how long should a municipality be protected in the enjoyment of a usufruct? In fact, it has been settled that a municipality should be protected for a hundred years, as this is the maximum life-expectancy of a man, even if he lives to a great age.

57 PAPINIAN, *Replies, book 7:* A proprietor left to a usufructuary a legacy of the estate which was subject to the usufruct in the latter's favor. After the legatee had been in possession of the estate in question for some time, he was forced to surrender it to the son of the testator, who had successfully brought the complaint of an undutiful will. It was clear from what happened afterward that the right of usufruct remained intact. 1. Under the terms of a *fideicommissum*, the fruits of certain estates were left as an alimentary provision for certain freedmen; on the death of any of the beneficiaries, the profits of their respective shares will revert from them to the bare owner of the land.

58 SCAEVOLA, *Replies, book 3:* A woman who had a usufruct died in the month of December, her tenants having already gathered in all the fruits, which the land yielded, in the month of October. The question arose whether rent ought to be paid to the heir of the usufructuary, despite the fact that she herself died before the first of March, the day on which the rent became due, or whether it ought to be apportioned between the heir of the usufructuary and the state, to whom the bare ownership of the land had been left. I replied that the state had no right of action against the tenant and that on the facts stated, the heir of the usufructuary would be entitled to collect the entire rent on the day it became due. 1. "I give and bequeath to Sempronius a sixth part of the proceeds from the crops of the cabbage and leek beds which I have in the field of the Farrarii." Are these words to be understood as implying a legacy of a usufruct? I replied that this was not a legacy of a usufruct, but one of a portion of the proceeds. 2. If, then, this is not a case of usufruct, does the legacy amount to an annual bequest of a sixth part of the proceeds? I replied that it must be held to be an annual bequest, unless the contrary was specifically proved by the heir.

59 PAUL, *Views, book 3:* The usufructuary is not required to replace trees which have been brought down by the force of a storm, and not through any fault on his part. 1. The usufructu-

ary is entitled to whatever is derived from the land or is gathered from it, as well as to the rental of fields that have already been let for hire, if such rents are expressly included. But, as in the case of sale, unless the rents were expressly reserved, the usufructuary can eject the hirer. 2. Profits derived from cutting reeds or stakes belong to the usufructuary, where these have generally been considered as part of the income of the land.

60 PAUL, *Views, book 5:* A usufructuary of land of any description, who is debarred from using it or who is ejected from it, can bring an action for the restitution of everything that was seized on that occasion. Moreover, should the usufruct in the meantime be terminated by some other contingency, an *actio utilis* will be granted in similar terms for the recovery of any fruits gathered in before this happened. 1. If a man lays claim to the usufruct of an estate and the estate is not in the possession of the owner, an action will be granted. Thus, if there is a dispute between two parties over the ownership of the estate, the usufructuary is, nonetheless, entitled to occupy the land, and the legal possessor must give him an undertaking that he, the possessor, will not prevent him, being the party to whom the usufruct was bequeathed, from enjoying the land while the inquiry into title lasts. However, if the question at issue is the right of the usufructuary himself, his enjoyment of the usufruct will be deferred for the time being, but an undertaking must be given that whatever he would have acquired by way of profits will be restored to him; if such an undertaking is not forthcoming, the usufructuary will be permitted to enjoy the land.

61 NERATIUS, *Replies, book 2:* A usufructuary is not permitted to attach a new gutter to the walls. Again, the rule is that should a building be left unfinished, the usufructuary is not entitled to complete it, even if he is unable to use that part of the property unless he does so. In fact, it has been held that there can be no usufruct of such a building unless it was expressly provided in the grant or legacy creating the usufruct that he could do either of the things mentioned above.

62 TRYPHONINUS, *Disputations, book 7:* It is said and fairly so that a usufructuary may hunt in the woods or on the hills of a landed estate. If he should capture a wild boar or a stag, he is not taking something which is the property of the bare owner, but he makes what he captures his either by the law governing the acquisition of fruits or by the *jus gentium.* 1. If wild animals were kept on the estate, confined in enclosures when the usufruct began, may the usufructuary train them but not kill them? Or if there are others which he confined by his own efforts at the commencement of the usufruct or which afterward were caught in a trap or fell into one, are these, by law, the property of the usufructuary? The most workable rule is, in order to avoid the rights of the usufructuary being uncertain as far as each individual animal is concerned due to the difficulty of distinguishing between them, that it suffices on the expiry of the usufruct to assign to the owner of the property the same number of each different species of animal as existed at the time when the usufruct began.

63 PAUL, *Exceptional Law, sole book:* We can transfer to others what we do not ourselves have; for example, if a man has an estate, then even although he does not have the usufruct, he can still grant a usufruct to another.

64 ULPIAN, *Edict, book 51:* Where a usufructuary is prepared to abandon his usufruct, he cannot be compelled to repair the house, that is to say, in those cases in which the usufructuary would ordinarily be bound to do so. Indeed, after issue has been joined with the usufructuary, the rule is that if he is prepared to abandon the usufruct, the judge must absolve him.

65 POMPONIUS, *From Plautius, book 5:* However, as the usufructuary is bound to repair any damage that he or his family has caused, he should not be absolved, even although he is prepared to abandon the usufruct; the fact is that he is himself obliged to do everything that a careful head of a household would do in his own house. 1. An heir is no more obliged to repair anything bequeathed by the testator which has already deteriorated through age than he would be if the testator had left the ownership to someone by way of legacy.

66 PAUL, *Edict, book 47:* Should a usufructuary reduce the value of a slave by torturing him, not only can an Aquilian action be brought against him but also he will be liable to the action for making a slave worse and the action for insult.

67 JULIAN, *From Minicius, book 1:* A man to whom a usufruct has been left as a legacy is entitled to sell it to a stranger to the family, even if the heir should prove unwilling.

68 ULPIAN, *Sabinus, book 17:* The question was raised in times gone by whether the offspring of a female slave belonged to the usufructuary. However, the opinion of Brutus, that the rules of usufruct are not applicable to this case, has prevailed; the fact is that one human being cannot be treated as being among the fruits of another. For this reason, the usufructuary will not even have a usufruct in such offspring. Suppose, however, that a usufruct of the child was bequeathed while it was still in the womb; will the legatee be entitled to the usufruct in this case? The answer is that as unborn offspring can be left by way of legacy, so can the usufruct thereof. 1. However, both Sabinus and Cassius held that the young of cattle belong to the usufructuary. 2. But if the usufruct of a flock or herd is left as a legacy, the usufructuary will be obliged to keep up the numbers of the flock out of the young that are subsequently born into it, that is, to allocate others to take the place of dead,

69 POMPONIUS, *Sabinus, book 5:* or worthless animals, the result being that the latter, after they have been replaced, become the property of the usufructuary, so as to avoid the outcome of the operation being a gain on the part of the bare owner. Indeed, just as the substituted animals immediately become the property of the bare owner, so too the animals which have been replaced cease to belong to him in accordance with the law governing the acquisition of fruits. In fact, as a general rule, whatever is produced belongs to the usufructuary, and, when he uses it to replace something else, it ceases to be his.

70 ULPIAN, *Sabinus, book 17:* What, then, is the position if the usufructuary does not do as required and does not keep up the numbers of the flock or herd? Gaius Cassius tells us in the tenth book of his *Civil Law* that he is liable to the bare owner. 1. In the interim, however, until the young are allocated and the dead animals are replaced, to whom do these young belong? Julian, in the thirty-fifth book of his *Digest*, says that the ownership of them is in suspense, with the result that if they are allocated as replacements, they belong to the bare owner, while if they are not so allocated, they belong to the usufructuary. This opinion is sound. 2. Accordingly, if the young die, it will be at the risk of the usufructuary and not the bare owner, and the former will be obliged to set aside other young as replacements. Hence, Gaius Cassius tells us in the eighth book that the carcass of a young animal that has died belongs to the usufructuary. 3. However, the rule that the usufructuary is obliged to allocate young as replacements only applies where the usufruct left as a legacy is of a flock or a herd or a stud of horses—that is, of a collective unit. On the other hand, if the usufruct is one of so many individual animals, in no respect will the usufructuary be required to keep up this number. 4. Again, suppose that at the time when the young were born, nothing had happened to require them to be allocated as replacements, but that something of the sort has occurred since their birth. It is a point to consider whether the usufructuary is bound to make the replacements from those born later or whether he must do so from those already born. I consider the better opinion to be that the young which are born when the flock is at full strength belong to the usufructuary, but that he will still have to make good any subsequent decline in the numbers of the flock. 5. What amounts to allocating as replacements is a question of fact; as Julian rightly states, it means to separate, to apportion, to make some sort of division. By this act of division, the bare proprietor will become owner of the young thus allocated.

71 MARCELLUS, *Digest, book 17:* Suppose a man builds on vacant ground in which someone else has a usufruct. If the building is removed before the expiry of the period, the lapse of which terminates a usufruct, then according to the opinion of the *veteres*, the usufruct is restored.

72 ULPIAN, *Sabinus, book 17:* If the owner of the bare property leaves the usufruct of it

by way of legacy, the correct view, as stated by Maecianus in the third book of *Questions concerning Fideicommissa*, is that the legacy is valid; and if it should happen that the usufruct [already existing over the property, of which the testator is bare owner] accedes to the bare property during the lifetime of the testator or before the acceptance of his inheritance, [the usufruct left as a legacy] will go to the legatee. Maecianus goes even further; even if the usufruct only accedes after the inheritance has been accepted, he holds that it is validly vested and will go to the legatee.

73 POMPONIUS, *Sabinus, book 5:* If the usufruct of a tract of vacant ground is left to me as a legacy, I can build a hut there for the purpose of safe-guarding goods of mine which are on the site.

74 GAIUS, *Provincial Edict, book 7:* If a usufruct is left as a legacy to Stichus, a slave of yours, and to Pamphilus, a slave of mine, it is as if the legacy had been made to you and me. Thus, there is no doubt that the usufruct belongs to us both in equal shares.

2

THE ACCRUAL OF USUFRUCT

1 ULPIAN, *Sabinus, book 17:* Whenever a usufruct is left by way of legacy, the right of accrual as between the usufructuaries only exists if the usufruct was left to them jointly. On the other hand, if a usufruct of a share of the property concerned was left to each of them separately, then, without doubt, the right of accrual does not exist. 1. Hence, Julian poses the following question in the thirty-fifth book of his *Digest.* Suppose a usufruct is left to a slave owned in common by two men and is thus acquired for each of his owners; if one of them rejects or loses the usufruct, does the other have the whole of it? Julian's opinion is that the whole belongs to that other; and even if the usufruct was acquired for the owners of the slave, not in equal shares, but in shares corresponding to their respective shares in the man, one must still look to the person of the slave and not of the owners, with the result that [the share of the owner who has rejected or lost the usufruct] goes to one of the owners and does not accede to the bare property. 2. Julian also holds that if a usufruct is left as a legacy to a slave owned in common and to Titius separately, then if one of the co-owners loses his usufruct, it ought to go, not to Titius, but to the other co-owner alone as the only person with a joint right to it. This opinion is sound; for as long as either one of the co-owners is exercising the right, it can be said that the usufruct continues to exist without any change. The same rule applies if a usufruct is left to two men jointly and to a third separately. 3. In some cases, however, even if the parties are not jointly entitled, a usufruct left by way of legacy may still accrue to one of them, for example, if the usufruct of a whole estate is left to me separately and is left to you in similar terms. For, as Celsus in the eighteenth book of his *Digest* and Julian in the thirty-fifth book state, by virtue of our concurrent rights, we both hold shares. The same result would also

follow in the case of the bare ownership; for if one party repudiated, the other would have the entire estate. However, in the case of usufruct, there is this further point to be made: Even when a usufruct has been created and afterward lost, it may nonetheless admit of the right of accrual. In fact, the authorities quoted by Plautius are all in agreement on this point, and, as Celsus and Julian elegantly put it, a usufruct is created and left by legacy every day and not, like the bare ownership, only at the time when an action can first be brought to recover it. Thus, as soon as either party finds that there is no one else whose right is concurrent with his, he will have exclusive enjoyment of the whole usufruct; and it makes no difference whether the legacy was joint or several. 4. Julian also states in the thirty-fifth book of his *Digest* that if two heirs have been instituted and the bare property is left as a legacy under reservation of the usufruct, the right of accrual does not exist as between the heirs; for the usufruct is held to be one created in shares and not one divided by concurrence.

2 AFRICANUS, *Questions, book 5:* Consequently, any share of the usufruct which has been lost will fall to the legatee as owner of the bare property.

3 ULPIAN, *Sabinus, book 17:* Neratius in the first book of his *Replies* considers that the rules of accrual do not apply in such circumstances. This view is consistent with the principle laid down by Celsus; he states that the right of accrual only exists when two parties have the usufruct of the whole and it is divided between them by concurrence. 1. Hence, Celsus in the eighteenth book states that if two men, being the owners of an estate, convey the bare ownership under reservation of the usufruct, then if either of them loses his usufruct, it reverts to the bare ownership, but not to the whole of it; rather, the usufruct of each man accedes to the share which he himself conveyed. In short, it is bound by law to revert to the share from which it was originally separated. 2. Further, the right of accrual exists not only where a usufruct is left by way of legacy to two parties; it also exists where the usufruct is left to one party and the estate to another. For if the party to whom the usufruct was left should lose it, it belongs to the other by virtue of the right of accrual rather than through its reversion to the bare property. There is nothing unusual in this as, if a usufruct is left by way of legacy to two men and is merged with the bare property as far as one of them is concerned, the right of accrual is not lost either for the benefit of the man affected by the merger or by him for the benefit of the other; and in whatever way he might have lost his usufruct before the merger, he may lose it in the same way now. This is the view taken by Neratius and Aristo and approved by Pomponius.

4 JULIAN, *Digest, book 35:* Suppose that the bare ownership of an estate is left by way of legacy to you and the usufruct of the same estate to you, me, and Maevius. Maevius and I will each have a third part of the usufruct and the remaining one third will be compounded with the bare property. However, if either Maevius or I should undergo a change of civil status, a third will be divided between you and the other of us with the result that the one of us who has not undergone a change of civil status will have half the usufruct and the bare ownership along with the other half of the usufruct will belong to you.

5 GAIUS, *Provincial Edict, book 7:* And if you convey the bare ownership to a third party under reservation of the usufruct, Julian still holds that the right of accrual exists and that you are not held to acquire a new usufruct.

6 ULPIAN, *Sabinus, book 17:* The same rule applies if, as far as one of the three usufructuaries is concerned, the usufruct is merged with the bare property. 1. However, if the bare property is left by way of legacy to someone under reservation of the usufruct and I am left a share of the usufruct, it is a point to consider whether the rules of accrual apply as between me and the heir. The correct view is that if either of us loses the usufruct, it reverts to the bare property. 2. If the usufruct of an estate is left by way of legacy to me absolutely and to you subject to a condition, it can be said that the usufruct of the whole estate belongs to me in the meantime and that if I undergo a change of civil status, I lose the whole usufruct. However, if the condition is fulfilled, then should I have undergone a change of civil status, the whole usufruct goes to you; but if there has been no change in my status, the usufruct must be shared between us.

7 PAUL, *Sabinus, book 3:* If a man leaves a legacy of a usufruct to his heirs and to Attius, Attius will have a half and the heirs a half. But if the legacy should be framed in the terms "to Attius and Seius with my heirs," the usufruct will be divided into three parts, one part being assigned to the heirs, one part to Attius, and one part to Seius. Nor does it make any difference whether the legacy is "to 'X' and 'Y' with Maevius" or "to 'X' and 'Y,' and Maevius."

8 ULPIAN, *Sabinus, book 17:* If a usufruct is left by way of legacy to a woman "with her children," then even if she loses her children, she will have the usufruct. On the other hand, if the mother dies, her children will still have the usufruct by virtue of the right of accrual. Indeed, Julian, in the thirtieth book of his *Digest,* holds that the same rule must be understood to apply in the case of a man who appoints his children as his sole heirs, even although he does not designate them legatees as such, but rather signifies that his wish is that the mother is to have her children associated with her in her enjoyment of the usufruct. However, Pomponius poses the following question: what if the heirs are a combination of children and strangers to the family? As to this, he holds that the sons must be considered as legatees, while if the testator's wish was that the children should have the enjoyment of the usufruct along with their mother, the rule is that the mother must be understood to be a legatee; and so in this case the consequences at law are in every respect similar to those in the other case.

9 AFRICANUS, *Questions, book 5:* If the bare ownership of an estate is left by way of legacy to two men and the usufruct of it to one, the three of them are not entitled, each to a third part of the usufruct; rather, the two will have half and the usufructuary half. The same rule applies if, to take the opposite case, there are two usufructuaries and one legatee of the estate.

10 ULPIAN, *Edict, book 17:* In some instances, a share in a usufruct falls by accrual even to a man who no longer has a share of his own, but who has lost it. For example, suppose that a usufruct is left to two men by way of legacy and that one of them, after joinder of issue, loses his usufruct; and suppose further that shortly after this, his co-legatee, who did not join issue, loses his usufruct too. The man who joined issue against the man who came forward to defend the case will obtain from the possessor only the half which he lost; for the share of his co-legatee falls to him by accrual and

does not go to the bare owner of the property. In short, usufruct accrues to the person, even if [the original share of the person concerned] has been lost.

11 PAPINIAN, *Definitions, book 2:* When the usufruct of the same thing is left by way of legacy to different individuals at the charge of different heirs respectively, the usufructuaries are held to be no less separately entitled than if the usufruct of the same thing had been left to two men in equal shares. It follows from this that no right of accrual exists between them,

12 ULPIAN, *Sabinus, book 17:* as one legatee can bring an action against one of the heirs for the usufruct, and the other against the other heir.

3

WHEN THE LEGACY OF A USUFRUCT VESTS

1 ULPIAN, *Sabinus, book 17:* Although a usufruct consists in the taking of fruits, that is to say, in some act on the part of the man who has the right to use and enjoy, still it vests no more than once. Its nature differs from that of a legacy by which something is left to a man from month to month, a month at a time, or from day to day, a day at a time, or from year to year, a year at a time; for in such cases, the legacy vests daily or monthly or annually. Hence, the following question: If a usufruct is left to a man by way of legacy for every day, or from year to year, a year at a time, does it vest once only? My own opinion is that it does not vest all at once, but at the beginning of each of the periods mentioned so that, in effect, there is a succession of legacies. Marcellus approves this view in the fourth book of his *Digest* in the case of a man to whom a usufruct for alternate days was left by way of legacy. 1. Accordingly, if the legacy is one of a usufruct which cannot be taken advantage of every day, the legacy is not invalid, but will apply to those days on which it can be enjoyed. 2. However, a usufruct and similarly a right of use will not vest before the inheritance has been accepted, as the creation of a usufruct is only perfected when someone can proceed to the immediate enjoyment of it. For the same reason, if a usufruct is left by way of legacy to a slave belonging to an inheritance, Julian tells us that despite the fact that other kinds of legacies may be acquired for the inheritance, still in the case of usufruct, we await the person of an owner who can use and enjoy the property concerned. 3. Again, if a usufruct is left by way of legacy as from a given day, it will not vest until that day arrives; of course, it is settled law that a usufruct can be left as from a given day or until a given day. 4. Not only does a usufruct not vest before the inheritance has been accepted; the right of action in respect of a usufruct does not do so either. The same rule applies if a usufruct is left by way of legacy as from a given day. Hence, Scaevola states that a person who brings an action before the day specified for the usufruct achieves nothing, though of course, quite apart from this, a man who brings an action before the due day, does so improperly.

4

THE WAYS IN WHICH A USUFRUCT OR A RIGHT OF USE IS LOST

1 ULPIAN, *Sabinus, book 17:* It is settled law that a change of civil status leads not only to the loss of a usufruct but also to the loss of the right of action in respect of a usufruct, and it is immaterial whether the usufruct was created by strict law or through the protection of the praetor. Accordingly, if a usufruct has been delivered or, contrary to strict law, exists over public land held on a long lease or a *superficies*, it is lost on a change of civil status. 1. However, a usufruct is only lost on change of civil status if it has been fully established by that time. So if a man undergoes a change of

civil status before the inheritance has been accepted or before the usufruct has vested, it is clear that it is not lost. 2. Suppose an estate is left to you by way of legacy as from a given day, and you are requested to deliver the usufruct to me. It is a point to consider whether if I undergo a change of civil status before the day specified in the legacy to you, it may not be the case that my usufruct is safe, as my change of civil status occurs before the usufruct vests. On a liberal construction, this may be held. 3. Indeed, so true is it that a change of civil status only destroys a usufruct which has already been fully established, that if a usufruct is left by way of legacy from year to year (or from month to month or from day to day), a year (or a month or a day) at a time, only the usufruct which has already started to run is lost; for example, if a usufruct is left by way of legacy from year to year, a year at a time, the usufruct for the current year only will be lost, and if from month to month, that for the current month, and if from day to day, that for the current day.

2 PAPINIAN, *Questions, book 17:* If a usufruct is left to two men separately for alternate years, the right of ownership runs on from one year to the next without the enjoyment; while if, instead of this, one takes the case of a single legatee who has been left the usufruct for every other year, the right of ownership with full enjoyment will be with the heir during the time in which the legatee is not entitled to the usufruct. If, however, one of the two men referred to above should die, the right of ownership will be at one with the enjoyment every other year; there can be no accrual for the benefit of the survivor, since each man had his own particular periods for the enjoyment of the entire usufruct, without there being a concurrent right on the part of the other. 1. Suppose that the event which occurs is not death but a change of civil status. As this is a case of a succession of legacies, the usufruct of that particular year only will be lost, providing, that is, that the party concerned had the right of usufruct in that year. This rule should also be upheld in the case of a single legatee who was given the usufruct from year to year, a year at a time, so that a reference to periods of time has the force of a renewal of the usufruct. 3. When a usufruct is left by way of legacy to separate individuals for every other year, then if they both opt for the same year, they impede one another as it does not appear to have been intended that they should take in concurrence. In fact, it makes a great deal of difference whether a usufruct is left as a legacy to two men together for every other year (in which case the exercise of the right certainly cannot continue beyond the end of the first year, any more than it could if the usufruct had been left on the same terms to one person) or whether it is left to separate individuals for every other year; in this case, if they wish to exercise it concurrently, either they will impede one another in view of the testator's intention, or if his intention does not seem to run counter to such exercise, the fruits produced every other year will be without an owner.

3 ULPIAN, *Sabinus, book 17:* Just as a usufruct can be left by way of legacy from year to year, a year at a time, so too it can be made the subject of a further legacy, to take effect whenever it is lost by change of civil status, as by the addition of the words, "as often as 'X' undergoes a change of civil status, I bequeath to him," or "as often as it is lost." In such a case, if the usufruct is lost by a change of civil status, it will be held to be renewed. Whence, the following question which has been the subject of discussion: If a usufruct has been left by way of legacy to a man for his lifetime, must it be held to be renewed as often as it is lost? Maecianus deals with this point, and my opinion is that it must be held to be so renewed. Hence, if a usufruct is left by way of legacy for a definite term—for example, for ten years—the same rule will apply. 1. However, does the renewal which takes effect after the loss of a usufruct by a change of civil status carry with it, unimpaired, the right of accrual? For example, suppose that a usufruct was left by way of legacy to Titius and Maevius and that the testator left the usufruct to Titius over again in the event of the latter's undergoing a change of civil status. If Titius takes the usufruct by renewal, does the right of accrual remain unimpaired between the legatees? Papinian, in the seventeenth book of his *Questions*, holds that it does remain unimpaired, just as it would if a third party had been substituted for Titius to take the usufruct; for the legatees are held to be jointly entitled in fact, albeit not by virtue of the words used. 2. Papinian also poses the following question. Suppose that a usufruct was left to Titius and Maevius by way of legacy and

that the testator, in providing for the renewal of the usufruct, left Titius not the whole, but a part only: Would the legatees be held to be jointly entitled? As to this, Papinian holds that if Titius should lose his usufruct, the whole would accrue to his co-legatee; however, if Maevius should lose his usufruct, the whole would not accrue, but part would go to Titius and part would revert to the bare property. This is a reasonable view to take, as it cannot be maintained that the circumstances, under which a man loses his usufruct and takes back a usufruct, will also entitle him to take by accrual any part of the usufruct which he has lost; that is to say, we hold the view that a man who loses his usufruct will get nothing by accrual out of what he loses. 3. That a usufruct is also lost by death does not admit of any doubt, since the right of enjoyment is extinguished by death, just like any other right which attaches to the person.

4 MARCIAN, *Institutes, book 3:* If a legatee is requested [under the terms of the will] to make over the usufruct bequeathed to him to someone else, the praetor should see to it that if the usufruct is lost, it should be from the person of the *fideicommissarius* rather than from that of the legatee.

5 ULPIAN, *Sabinus, book 17:* A usufruct which is the subject of a legacy can be renewed, no matter how it may be lost, as long as it is not by death unless, of course, the testator in that event left it to the heirs. 1. If a man who has acquired a usufruct through a slave makes over to another the usufruct of that slave and nothing more besides, there is no doubt that he retains the usufruct which was acquired through the man. 2. It is generally held that a usufruct comes to an end in the event of a radical change in the thing subject to it; for example, if the usufruct of a house has been left to me as a legacy, and the house collapses or is destroyed by fire, then without doubt the usufruct of the house is extinguished. What of that of the site? It is quite clear that if a house has been destroyed by fire, no usufruct remains either in the site or in the surviving materials. This is also the opinion of Julian. 3. If the usufruct of a tract of vacant ground is left as a legacy, and a building is erected on the site, it is agreed that the subject matter is changed and the usufruct extinguished. Clearly, if it was the bare owner who erected the building, he will be liable to an action on the will or to one for fraud,

6 POMPONIUS, *Sabinus, book 5:* (and the usufructuary will also be entitled to the interdict against force or stealth)

7 JULIAN, *Digest, book 35:* unless the bare owner takes down the building and grants me a usufruct of the site; I am taking the case to be one in which the period of time, the passage of which terminates a usufruct, has elapsed.

8 ULPIAN, *Sabinus, book 17:* When the usufruct left by way of legacy is of an estate, then if the house should be destroyed, the usufruct will not be extinguished, because the house is an accession to the land. The usufruct would no more be extinguished in this case than it would if trees were to fall.

9 PAUL, *Sabinus, book 3:* Moreover, I will also be entitled to use and enjoy the ground on which the house stood.

10 ULPIAN, *Sabinus, book 17:* What, however, would be the position if the estate was an accession to the house? Let us consider whether it may not be the case that the usufruct of the estate itself would be extinguished. In fact, the same rule must be held to apply, so that it would not be extinguished. 1. The usufruct of a house is extinguished not only if the house is reduced to a vacant site; it is also lost if the testator demolishes the house and erects a new one in its place. But if he rebuilds the house in stages, we cannot hold that the same rule applies, even although every part of the house should eventually be renewed. 2. If a field or a tract of farmland, the usufruct of which has been left as a legacy, should be flooded so that it becomes a pond or a swamp, the usufruct is without doubt extinguished. 3. Further, if the usufruct of a pond is left as a legacy and the pond dries up so that it becomes a field, the usufruct is extinguished as its subject matter has changed. 4. However, if the usufruct of a tract of arable land is left as a legacy and vineyards are planted on it, or vice versa, I do not think that the usufruct will be extinguished. But certainly, if the usufruct of a wood has been left by way of legacy and the wood is thereafter cut down and the ground turned into cultivated land, the usufruct is without doubt extinguished. 5. Should the usufruct of a mass of metal be left as a legacy and utensils be fashioned out of this or vice versa, the opinion of Cassius, as quoted by Urseius, is that the usufruct would come to an end. I consider that this view is sound. 6. Similarly, if an ornament is melted down or its shape changed, this extinguishes a usufruct in it. 7. With regard to the

usufruct of a ship, Sabinus tells us that if the ship is rebuilt in stages, the usufruct is not lost; but if the ship is dismantled, even though it should be reconstructed with the self-same timbers without a single piece more being added, the usufruct is extinguished. I consider this to be the better view; for even if a house is rebuilt, the usufruct is extinguished. 8. If the usufruct of a team of four chariot horses is left as a legacy and one of the horses dies, is the usufruct thereby extinguished? My own opinion is that the question turns on whether the usufruct bequeathed was of the horses or of the team. If it was of the horses, it will continue to exist in respect of the surviving horses; but if it was of the team, it will not be preserved, as the team as such has ceased to exist,

11 PAUL, *Sabinus, book 3:* unless another horse is substituted for the one that died before the vesting of the legacy.

12 ULPIAN, *Sabinus, book 17:* If the usufruct of a bathhouse has been made the subject of a legacy and the testator turns it into a dwelling, or if of a shop and the testator turns it into a place to live, it must be held that the usufruct is extinguished. 1. Similarly, if a man makes the usufruct of an actor the subject of a legacy and then puts him to some other kind of employment, it must be held that the usufruct is extinguished.

13 PAUL, *Sabinus, book 3:* Suppose a usufructuary has got in the harvest and has subsequently died. Labeo holds that the blades which are lying cut belong to his heir, while the ears which are still attached to the ground belong to the owner of the land; as he says, fruits are considered to be gathered when the ears of corn are severed or the hay cut or the grapes picked or the olives shaken from the trees, even although the grain has not yet been ground or olive oil made or the vintage completed. However, although what Labeo states with reference to olives being shaken from the trees is certainly true, as Julian says, a different rule must be observed in the case of olives which fall of their own accord. Fruits become the property of the usufructuary when he has gathered them, but they belong to a possessor in good faith as soon as they are separated from the ground.

14 POMPONIUS, *Sabinus, book 5:* Change of civil status and death apart, all other causes of extinction of usufruct admit of even a partial extinction of the same.

15 ULPIAN, *Sabinus, book 18:* Sometimes the bare owner can grant a slave held in usufruct his freedom, for example, if the usufruct was left by way of legacy to last until the slave should be manumitted. In this case, as soon as the owner begins the process of manumission, the usufruct is extinguished.

16 ULPIAN, *Disputations, book 5:* If a usufruct is left to me by a legacy subject to a condition and in the meantime it is with the heir, the latter can leave the usufruct by way of legacy to a third party. The result is that if the condition governing the legacy to me is fulfilled, the usufruct left by the heir comes to an end. However, if I lose the usufruct, it will not revert to the legatee, to whom it was bequeathed in absolute terms by the heir. The reason is that the legal position of joint legatees cannot arise from different wills.

17 JULIAN, *Digest, book 35:* Suppose that the usufruct of an estate has been left to you absolutely by way of legacy and that the bare ownership of the same has been left as a legacy to Titius subject to a condition; suppose further that during the pendency of the condition, you acquire the bare right of ownership and that after this the condition is fulfilled. Titius will have the estate with full rights, and it is immaterial that the bare ownership was bequeathed under reservation of the usufruct, because when you acquired the bare ownership, you lost all right to the legacy of the usufruct.

18 POMPONIUS, *Sabinus, book 3:* Should a slave belonging to an inheritance be left a legacy of a usufruct before that inheritance has been accepted, the better view is that when the inheritance is accepted, the usufruct passes to you [the heir] and is not extinguished on the grounds of a change of ownership. The reason is that it did not vest before you presented yourself as heir.

19 GAIUS, *Provincial Edict, book 7:* Neither a usufruct nor an *iter* nor an *actus* is lost by a change of ownership.

20 PAUL, *Plautius, book 15:* Will a man who has a usufruct retain it if he only exercises the right of use, being under the impression that the right of use is the only right which he has?

My opinion is that if he chooses to exercise the right of use only in full knowledge of the fact that he is entitled to the usufruct, he must still be held to be enjoying the fruits. If, however, he does not know of his entitlement to the usufruct, I consider that he will lose his right to the fruits, as his use is founded, not on what he has, but on what he thinks he has.

21 MODESTINUS, *Distinctions, book 3:* If a usufruct is left by way of legacy to a *civitas* and the site of the *civitas* is afterward turned over to the plough, it ceases to be a *civitas*, as happened to Carthage. Accordingly, it ceases to have the usufruct on the grounds, as it were, of death.

22 POMPONIUS, *Quintus Mucius, book 6:* Suppose that the right of use of a house has been left by way of legacy to a woman and that she has gone overseas and has been absent throughout the period prescribed for the loss of a right of use, but that her husband has made use of the house. The right of use is nevertheless retained, just as if the woman had left her slaves in the house and gone off on her travels. This rule can be stated with even greater conviction if a husband leaves his wife in a house, when the right of use of the house has been left as a legacy to the husband himself.

23 POMPONIUS, *Quintus Mucius, book 26:* If a field in which we have a usufruct is flooded by a river or by the sea, the usufruct is lost since even the bare ownership is lost in such a case; indeed, not even by fishing can we preserve the usufruct. However, just as the bare ownership is revived if the water recedes on the same flood tide with which it came, so too it must be held that the usufruct is restored.

24 JAVOLENUS, *From the Posthumous Works of Labeo, book 3:* I had the usufruct of a garden; a river covered the garden and then receded. It is the opinion of Labeo that the right of usufruct is restored, as the legal position of the ground itself remained the same throughout. I think that this is only true if the river covered the garden as the result of a flood; if the river changed its course and began to flow in that quarter, my opinion is that the usufruct is lost, as the ground occupied by the riverbed becomes public property and cannot be restored to its original condition. 1. Labeo holds that the same rule should be observed in the case of an *iter* or an *actus*; but my feelings with regard to these are the same as they are with regard to the usufruct. 2. LABEO. Even if the topsoil is removed from my land and replaced with other soil, the ground does not, for this reason, cease to be mine, any more than it would if the field were manured.

25 POMPONIUS, *Readings, book 11:* It is accepted that where a usufruct is one of a particular share or one held jointly, it may be lost by nonuse.

26 PAUL, *Neratius, book 1:* If an estate which has been occupied by the enemy, or a slave captured by them, is afterward liberated, a usufruct in either is restored by the law of *postliminium.*

27 PAUL, *Handbook, book 1:* If a slave in whom someone has a usufruct is surrendered noxally by the bare owner to the usufructuary, the servitude is merged by the acquisition of the ownership, and the usufruct will thus be terminated.

28 PAUL, *Plautius, book 13:* If a usufruct for alternate years is left by way of legacy, it cannot be lost by nonuse, as this is a case of a succession of legacies.

29 ULPIAN, *Sabinus, book 17:* Pomponius raises the following question: Suppose the bare owner of an estate in which I have a usufruct hires the land from me and then sells it to Seius without reserving the usufruct; do I retain the usufruct through the buyer? Pomponius holds that even if the bare owner should pay me rent, nevertheless the usufruct is lost, because the buyer enjoys, not in my name, but in his own; but the bare owner is liable to me on the hire to the extent of the interest I had in what was done being left undone. It is true that if a man hires the usufruct from me and then lets it for hire to a third party, the usufruct is retained; but if the bare owner of the land lets the usufruct for hire in his own name, it must be held that it is lost, as the tenant would not be enjoying it in my name. 1. But suppose the bare owner purchased the usufruct from me and then sold it; would I lose the usufruct? My opinion is that I would lose it since here again the buyer of the estate would not be enjoying it as having been bought from me. 2. Pomponius also raises this

question: Suppose I am requested to make over to you a usufruct which has been left to me as a legacy; am I considered to be enjoying the usufruct through you, so that it will not be be lost? Pomponius admits that on this point, he is undecided. However, the better opinion is, as Marcellus states in an annotation, that this situation is in no way prejudicial to the *fideicommissarius*, as he has an *actio utilis* in his own name.

30 GAIUS, *Provincial Edict, book 7:* The flesh and hides of cattle that have died are not accounted fruits as, on death of an animal, a usufruct in it is extinguished.

31 POMPONIUS, *Quintus Mucius, book 4:* If the usufruct of a flock is left as a legacy and the numbers of the flock are reduced to such an extent that it can no longer be regarded as a flock, the usufruct comes to an end.

5

THE USUFRUCT OF THINGS WHICH ARE CONSUMED OR DIMINISHED BY USE

1 ULPIAN, *Sabinus, book 18:* The senate has decreed that it is possible to leave as a legacy a usufruct of any kind of property whatever that has been established to admit of private ownership. This *senatus consultum* is held to sanction as permissible the legacy of a usufruct of such things as are destroyed or diminished by use.

2 GAIUS, *Provincial Edict, book 7:* However, in the case of money, security must be duly given to those at whose charge the legacy of the usufruct of that money is left. 1. This *senatus consultum* did not bring it about that there might, strictly speaking, be a usufruct of money, as natural reason cannot be altered by the authority of the senate; but with the introduction of the above safeguard, quasi-usufruct was initiated.

3 ULPIAN, *Sabinus, book 18:* In view of this, a usufruct of any kind of thing whatever can now be left as a legacy. Does this apply to debts? Nerva thinks not, but the better opinion, which is that held by Cassius and Proculus, is that a usufruct of debts can be left by way of legacy. However, Nerva says that such a usufruct can actually be left to the debtor himself and that if this is done, he must be excused from paying interest.

4 PAUL, *Neratius, book 1:* Consequently, the debtor too can be required to furnish a *cautio*.

5 ULPIAN, *Sabinus, book 18:* This *senatus consultum* does not just apply to the case of a man who leaves a legacy of a usufruct of money or of anything else which belongs to him; it also applies where the subject matter of the usufruct belongs to someone else. 1. Suppose that there is a legacy of a usufruct of money or of some other fungibles and that a *cautio* is not given. It is a point to consider whether, on the expiry of the usufruct, the money which was handed over or the other fungibles can be made the subject of a *condictio*. However, if the usufruct is still in existence and the party entitled to do so wishes to bring a *condictio* to have the *cautio* given, it may be said that the omitted *cautio* can be made the subject of a *condictio* for an unascertained amount. On the other hand, if the usufruct has terminated, Sabinus holds that a *condictio* can be brought for the actual amount in question. This opinion is approved by Celsus in the eighteenth book of his *Digest* and seems to me not to be lacking in subtlety. 2. What we have stated above with reference to the usufruct of money or of other fungibles also applies to the right of use; as both Julian and Pomponius, in the eighth book of his *Stipulations*, tell us, the right of use and the usufruct of money rest on the same principles.

6 JULIAN, *Digest, book 35:* If a legacy of ten thousand is left to you and a usufruct of the same ten thousand to me, the whole ten thousand will become your property. However, five thousand will have to be paid to me on the terms of my giving you security that at the time of my death or change of civil status, that sum will be returned to you. For if an estate was left to you as a legacy and a usufruct in the same estate to me, you would have the ownership of the whole estate, but you would have part of it with the use and enjoyment and part of it without; and the person to whom I would give such security as a careful man would think proper would be you and not the heir. 1. However, if the usufruct of the same

ten thousand is left by way of legacy to two men, they will each receive five thousand, and they will have to give security to each other as well as to the heir.

7 GAIUS, *Provincial Edict, book 7:* If a usufruct of wine, olive oil, or grain is left by way of legacy, the ownership thereof ought to be transferred to the legatee, and he should be required to furnish a *cautio* to the effect that whensoever he dies or undergoes a change of civil status, goods of the same quality will be returned; alternatively, the goods should be valued and security given for the payment of a sum of money certain. This latter method is the more convenient. We may take it as read that the same rule applies to all other fungibles.

8 PAPINIAN, *Questions, book 17:* A man appointed three heirs and left a usufruct of fifteen thousand as a legacy to Titius, ordering two of the heirs to give security for the legatee. It was held that the legacy relating to the provision of the *cautio* was valid and that the *senatus consultum* did not oppose this construction, as nothing in it actually prevented the *cautio* being bequeathed; the view taken was that there were two legacies, the one as if of a sum of money certain and the other of an unascertained amount. Consequently, by way of a claim on the usufruct, an heir who had received security from his co-heir could be sued for a portion of the money, and an action for an unascertained amount could be brought against the same defendant, should he have failed to give security. However, an heir who had given security but who, by reason of the delay on the part of his co-heir, had not received security would not, in the meantime, be liable to a claim on the usufruct under the *senatus consultum*, nor would he be liable to an action for an unascertained amount, since he had already given security to his co-heir. We are also of the opinion that the legatee can be compelled to give a promise. However, if on the expiry of the usufruct, the co-heirs are sued on account of their verbal guarantee, they will not have an action based on mandate; the fact is that they did not undertake a mandate, but only complied with the terms of the will and are therefore released from their obligation under the legacy of the *cautio*. One point that need not detain us long is this. The second legacy, that is, the legacy of the *cautio*, is not to be taken as having been left for the benefit of the heirs, but of the man to whom the usufruct of the money was left; he was the party for whom the testator wished to provide and in whose interest he thought it to be that he should not look for verbal guarantors at his own risk.

9 PAUL, *Neratius, book 1:* In a stipulation for the return of the amount involved in a usufruct of money, two contingencies only are brought in, namely, death and change of civil status,

10 ULPIAN, *Edict, book 79:* as the use of money cannot be lost in any circumstances other than these. If the right of use only of money is left as a legacy, then, because in this particular case the term "right of use" must more correctly be understood as embracing a right to the profits as well, the aforesaid stipulation will have to be made. Some authorities hold that the stipulation is not perfected before the money is handed over. However, my opinion is that the stipulation is binding whether it is made before or after the payment of the money.

11 ULPIAN, *Sabinus, book 18:* If a usufruct of wool or perfumes or spices is left to someone by way of legacy, it is held that at law, no usufruct has been created in these things, but that recourse must be had to the *senatus consultum*, which provides for a *cautio* in respect of such things.

12 MARCIAN, *Institutes, book 7:* Money was left to Titius on the terms that it was to go to Maevius after the death of the legatee. The deified Severus and the deified Antoninus laid down in a rescript that even although it had been added that Titius was to have the right of use of the money, still the legacy to him was of the ownership of it; mention of the right of use was made because the sum in question was to be handed over as from Titius after his death.

6

THE ACTIONS FOR CLAIMING A USUFRUCT OR DENYING THAT ANOTHER HAS A RIGHT TO ONE

1 ULPIAN, *Sabinus, book 18:* If the benefit of a servitude attaches to an estate which is the subject of a usufruct, Marcellus, in his eighth book, in a note on Julian, approves the view

held by Labeo and Nerva that the usufructuary cannot bring an action to recover the servitude, but that he can bring one to recover the usufruct. This means that if the neighbor does not permit the usufructuary to walk and drive across the servient land, he is liable to the usufructuary on the grounds that he is not permitting him to enjoy the usufruct. 1. When a usufruct has been left by way of legacy, it requires those auxiliary rights without which the beneficiary cannot enjoy it. Thus, if a usufruct is left as a legacy, it is essential that a right of access go with it too; this is so to the extent that if a man leaves the usufruct of a particular tract of land as a legacy on the terms that his heir is not to be compellable to furnish a *via*, this additional proviso will be held to be inoperative. Similarly, if a usufruct is left as a legacy and an *iter* is withheld, the withholding of this right is inoperative, as a right of access always goes with a usufruct. 2. However, if there is a legacy of the usufruct of a site to which there is no right of access across land belonging to the inheritance, the usufructuary can undoubtedly bring an action on the will to have the usufruct given to him coupled with a means of access to the site. 3. Pomponius, in his fifth book, is undecided whether when a usufruct has been left as a legacy, the usufructuary is entitled to a right of access only and thus to an *iter* or whether he can in fact claim a *via* too. His opinion is and quite rightly so that the usufructuary ought to have such amenities made available to him as are required for the enjoyment of the usufruct. 4. Will the heir also have to provide him with other amenities and servitudes, such as the right to water and to light, or not? My opinion is that he can be compelled to provide only those amenities without which the usufructuary cannot in any way make use of the land; but if he could make use of it, even although not without some inconvenience, such amenities need not be furnished.

2 POMPONIUS, *Sabinus, book 5:* If an action is brought on a will for the usufruct of an estate against an heir who has cut down trees or demolished a building or in any other way has detracted from the worth of the usufruct, as by imposing servitudes on the estate or releasing a neighboring estate from a servitude, it is the duty of the judge to take into account the condition of the estate before issue was joined, so that the interests of the usufructuary may be protected by him.

3 JULIAN, *Digest, book 7:* Should a man to whom a usufruct has been delivered as the result of a *fideicommissum* have ceased to use it for such length of time as would have caused him to lose it if it had become his legally, he is not entitled to an action to have it restored; for it is inappropriate that parties who have acquired the possession only and not the ownership of a usufruct should be in the better legal position.

4 JULIAN, *Digest, book 35:* An estate was left as a legacy to Titius under reservation of the usufruct, and the usufruct of the same estate was left to Sempronius, subject to a condition. I said that in the interim the usufruct was at one with the bare property, even although the general rule is that when an estate is left as a legacy under reservation of the usufruct, the usufruct remains with the heir. The reasoning behind my opinion is that when an owner leaves an estate as a legacy under reservation of the usufruct and leaves the usufruct to another by way of a legacy subject to a condition, it is not his intention that the usufruct should remain with the heir.

5 ULPIAN, *Edict, book 17:* The only person who can claim at law that he has the right to use and enjoy property is the man who has the usufruct of it. The owner of the estate cannot do so, as a man who has the ownership does not have a separate right of use and enjoyment; the fact is that a man's estate cannot be subject to a servitude in his own favor; and a man who brings an action must do so with reference to a right of his own and not that of another. In fact, although an action to deny the right may well lie to an owner against a usufructuary, he is still held to proceed rather on his own right than on that of another, when he contends that the usfructuary has no right of use against his will or that he has a right to restrain him. If it should happen that the man who brings this action is not the owner of the property, then even although the usufructuary does not have the right of use, he will still prevail by reason of the rule that possessors are to be preferred, even if they have no title. 1. Does an action *in rem* lie to the usufructuary against the bare owner only or equally against anyone at all who is in possession? Julian, in the seventh book of his *Digest*, tells us that he is entitled to such an action against any possessor whomsoever; for example, if the benefit of a servitude attaches to an estate, which is the subject of a usufruct, the usufructuary should bring an action against the owner of the adjacent [servient]

estate to claim, not the servitude, but the usufruct. 2. If a usufruct of part of an estate is created, an action *in rem* can be brought with reference to it, whether the party concerned lays claim to the usufruct or contends that another has no right to it. 3. It is clearly evident that in such actions which are brought with reference to a usufruct, fruits fall to be taken into account as well. 4. Suppose that after joinder of issue in an action for a usufruct, the usufruct should come to an end; do fruits cease to be claimable thereafter? My opinion is that they do so cease; in fact, Pomponius tells us in the fortieth book that in the event of the usufructuary's death, his heir should be granted an action for only such fruits as existed before the death. 4a. If the usufructuary gains his case, all additional incidents must be returned to him. So if the usufruct left by way of legacy was one of a slave, the possessor must hand over every acquisition made by the slave in connection with the property of the usufructuary or through the slave's own services. 5. Further, suppose that a usufruct is lost by lapse of time, the circumstances being that one man was in possession and another came forward to contest the suit. It is not enough for the latter to renew the usufruct; he must also give an undertaking in respect of recovery of the usufruct by virtue of superior title. For what if the party who was in possession pledged the slave or the estate, and the claimant is forbidden by the pledge-creditor to exercise his lawful right? Accordingly, an undertaking will have to be given. 6. Just as fruits must be handed over to a usufructuary who brings an *actio confessoria in rem*, so too they must be handed over to the bare owner, if he brings an *actio negatoria*. But this rule only applies in those cases in which the party who brings the action is not in possession (it should be noted that there are cases in which an action lies to a person in possession); if either of the parties mentioned is in possession, he will obtain nothing under the head of fruits. Thus, does the duty of the judge come to more than this: to see to it that the usufructuary is free to enjoy the property without interference and that the owner is protected against disturbance?

6 PAUL, *Edict, book 21:* If a man who has joined issue in an action for a usufruct ceases to possess without fraudulent intent, he will be absolved. However, if he has offered to defend the case and joined issue in the action for the usufruct, as if he were in possession, judgment will go against him.

7

THE SERVICES OF SLAVES

1 PAUL, *Edict, book 2:* A service consists in the performance of some task, and it does not exist until the arrival of the day on which it has to be rendered; this is similar to the case of a stipulation made for "the offspring to be born of Arethusa."

2 ULPIAN, *Edict, book 17:* The services of a slave which have been left by way of legacy are not lost by a change of civil status.

3 GAIUS, *Provincial Edict, book 7:* The usufruct of a slave includes his services and payments received as a return for such services.

4 GAIUS, *Urban Edict on Issues of Liberty, book 2:* The fruits to be derived from a slave consist in his services or, conversely, the services of a slave are accounted his fruits. And, as in other cases, fruits are understood to be what remains after the deduction of expenses necessarily incurred, so this also applies in the case of the services of slaves.

5 TERENTIUS CLEMENS, *Lex Julia et Papia, book 18:* When the services of a slave are left as a legacy, I have been taught and Julian is of the opinion that a right of use is understood to be given.

6 ULPIAN, *Edict, book 55:* When an action is brought for the services of a slave who is a craftsman, restitution will have to be made according to the value of his skilled services; but if the action is for the services of a slave employed on menial tasks, this will depend on the type of work he does. This is the view taken by Mela. 1. If a slave is under five years of age or is infirm or is one who was unable to do any work for his owner, no estimation of the value of his services will be made. 2. Similarly, in the valuation, no account will be taken of the pleasure the slave gave or the affection felt for him, as where his owner has a special liking for him or treats him as a favorite. 3. In addition, the estimation of value falls to be made under the deduction of expenses necessarily incurred.

8

THE RIGHT OF USE AND THE RIGHT OF HABITATION

1 GAIUS, *Provincial Edict, book 7:* Let us now consider the right of use and the right of habitation. A bare right of use can also be created, that is, use without entitlement to the fruits. This right of use is generally created in the same ways as is usufruct.

2 ULPIAN, *Sabinus, book 17:* A man to whom a right of use is left is entitled to use but not to take the fruits. Let us consider some cases individually. 1. Suppose the right of use of a house is left to a husband or to a wife. If it is left to the husband, he is entitled to live in the house, not just by himself, but with his slaves too. It was once a debatable point whether he could also live there with his freedmen, but Celsus holds that he can do so and that he may also entertain a guest. Celsus tells us this in the eighteenth book of his *Digest*, and the same opinion has the approval of Tubero. Further, I recall that in the writings of Labeo, in the work entitled *Posthumous Works*, the question is discussed whether he can also take in a lodger. Labeo holds that a man who is himself living in the house can take in a lodger; he also states that he may entertain guests and take in his freedmen

3 PAUL, *Vitellius, book 3:* and his clients;

4 ULPIAN, *Sabinus, book 17:* but that not even persons of this description may live in the house unless he is there too. Proculus, however, in an annotation on the subject of lodgers, states that a person who lives with him cannot properly be called a lodger. Accordingly, even if the usuary takes rent, as long as he himself is living in the house too, this should not be held against him; for what if a man of humble station should be left the right to use so spacious a house that he is content with a small part of it? Again, the usuary may live in the house with such persons as he has in his employ in place of slaves, even although they are freemen or the slaves of another. 1. As Quintus Mucius was the first to allow, if the right of use of a house is left to a woman, she can live there with her husband; otherwise, if she wanted to make use of the house, she would have to live there as a single woman. On the other hand, there has never been any doubt that a wife may live with her husband. Suppose, then, that the right of use of a house is left by way of legacy to a widow; if she remarries after the creation of the right, can she, as a married woman, live in the house with her husband? The correct view, as Pomponius, in the fifth book, and Papinian, in the nineteenth book of his *Questions*, both hold, is that she is entitled to live there with her husband, even if she marries after the right has been created. What is more, Pomponius holds that her father-in-law may also live there with her.

5 PAUL, *Sabinus, book 3:* Indeed, a father-in-law may have his daughter-in-law living with him, at least, if her husband is there too.

6 ULPIAN, *Sabinus, book 17:* A woman may have living with her not only her husband but also her children and her freedmen, as well as her parents; Aristo himself says as much in an annotation on Sabinus. Indeed, it has to be admitted that women are entitled to take in the same category of persons as are men.

7 POMPONIUS, *Sabinus, book 5:* However, a woman cannot receive a man as a guest unless he is one who can, with propriety, live in the same house as she who has the right of use.

8 ULPIAN, *Sabinus, book 17:* Persons who have the right of use of a house cannot let the premises for exclusive occupation or grant to others the right to live there without them; nor can they sell the right of use. 1. If the right of use of a house is left by way of legacy to a woman on the condition that she has left her husband, she must be released from this condition, and she can live in the house with her husband. This view has the approval of Pomponius in the fifth book.

9 PAUL, *Sabinus, book 3:* Further, when the right of use of any other type of property is left as a legacy, the rule is that a wife is entitled to the use of it in common with her husband.

10 ULPIAN, *Sabinus, book 17:* If a right of habitation is left as a legacy, does this amount to

the same thing as a legacy of a right of use? Papinian, in the eighteenth book of his *Questions*, admits that the effects of a legacy of a right of use and of one of a right of habitation are virtually the same. Consequently, the legatee of a right of habitation cannot make a gift of it, but he can take in the same categories of persons as can a usuary. However, the right itself does not pass to the heir, nor is it lost by nonuse or by a change of civil status. 1. If the bequest is one of *chresis*, it should be considered whether this amounts to a right of use. Papinian, in the seventh book of his *Replies*, holds that, in this case, a right of use has been left, but that a right to the fruits has not. 2. If a bequest is framed in the terms, "to 'X,' the usufruct of the house for the purpose of living in it," it is a point to consider whether the beneficiary has the right of habitation only or whether, in fact, he has the usufruct. Both Proculus and Neratius are of the opinion that the legacy consists of the right of habitation only; this is the correct view. But if the testator has said, "the right of use for the purpose of living there," there would be no doubt that the legacy was valid [as regards the right of use]. 3. Whether a right of habitation is a right lasting for one year only or for the lifetime of the beneficiary was a question discussed by the *veteres*. Rutilius states that a right of habitation holds good for the duration of the beneficiary's life, and this view has the approval of Celsus in the eighteenth book of his *Digest*. 4. If the right of use of an estate is left, no one is in any doubt that this falls a long way short of a right to the fruits. But let us consider what such a bequest entails. Labeo states that the beneficiary is entitled to live on the estate and that he can debar the owner from entering it, but he cannot debar a tenant or the owner's slaves, that is to say, such of his slaves as are there for the purpose of cultivating the land. On the other hand, if the owner sends his household slaves on to the land, such slaves can be debarred on the same grounds as the owner himself can be debarred. Labeo also states that the usuary is entitled to the exclusive use of places used for storing wine and oil, and that the owner may not make use of them without his permission.

11 GAIUS, *Common Matters or Golden Words, book 2:* The usuary is permitted to remain on the land only during such time as he is not a nuisance to the owner of the estate and does not get in the way of those who are engaged on agricultural work. Further, he is not entitled to sell, hire, or gratuitously grant to anyone else the right which he has.

12 ULPIAN, *Sabinus, book 17:* A man is entitled to have the full right of use, if he is left the right to use both a country estate and a country mansion. But the more precise rule is that the owner is entitled to enter for the purpose of taking the produce, and during the time of harvest it has to be admitted that he can also live there. 1. As well as having the right of habitation, a man who is granted a right of use will also have the right to walk and drive about. Sabinus and Cassius tell us that he may use firewood for his everyday needs and that he may make use of the garden and take fruit, vegetables, flowers, and water; however, he may do so, not so as to make a profit, but only in conformity with his right of use, that is to say, not to the extent of complete consumption. Nerva takes the same view, adding that he may use straw and brushwood, but not leaves, olive oil, grain, or the fruits of other plants. However, Sabinus, Cassius, Labeo, and Proculus hold that in addition, he may take from what is produced on the estate as much as is required to maintain himself and his family, including such produce as Nerva says he may not take; Juventius even says that he can make use of such produce when he has guests or is entertaining. I consider that this is the correct view as, in some ways, a usuary should be treated more generously in accordance with

the respect due to a person to whom a right of use has been left. However, it is my opinion that he may make use of produce of the kind last mentioned only on the country estate. As to fruit, vegetables, flowers, and firewood, it is worth considering whether he can only use them on the spot or whether they can also be brought into a town to him; but the better opinion is to allow that they can be brought into a town, as this is not an excessive imposition, if the estate yields a plentiful supply. 2. If a man is left the right of use of livestock, for example, a flock of sheep, Labeo holds that he may only use them for the purposes of manuring and that he may not take wool, lambs, or milk, as these are rather to be classed as fruits. I consider that he may go further and use a moderate amount of milk; for the wills of the dead should not be interpreted so strictly as this. 3. If the right of use of a herd of cattle is left, the usuary will be entitled to make full use of them, both for plowing and for any other tasks for which cattle are suited. 4. If the right of use of a stud of horses is left as a legacy, it is a point to consider whether the legatee can break them in and use them as draft animals. Should the man to whom the use of the horses was left be a charioteer, I am of the opinion that he may not use them for races in the circus, as the rule is that this amounts to letting them for hire. However, if the testator made the legacy in the knowledge that this was the legatee's occupation and way of life, he is considered to have had such use as this in mind. 5. If someone is left the right of use of a servant, he may use the man in his own service and in that of his wife and children, and he will not be considered to have granted his right to someone else, if he makes use of the man together with them. However, if the right of use of a slave is left to a son-in-power or a slave, the right is acquired for the father or master and may be exercised for his benefit only and not that of those who are in his power. 6. As Labeo tells us, a usuary may not let out the services of a slave in whom he has a right of use, nor assign them to another; for how can a man assign such services to another, when he is required to make use of them himself? However, Labeo does hold that if a man rents a farm, a slave in whom he has a right of use may work on it; as he says, what difference does it make what the circumstances are in which the usuary makes use of the man's services? Accordingly, if the usuary contracts to prepare wool for use, he can likewise have the work done by a slave woman in whom he has a right of use. Similarly, if he undertakes to weave clothing or to build a block of flats or a ship, he can take advantage of the services of a slave in whom he has a right of use to have the work done. Nor does this view conflict with the opinion of Sabinus. He holds that when the right of use of a slave woman is given, she may not be sent out to work as a spinner of wool, nor her services be hired out for a fee, but that by law, the usuary can only constrain her to work wool for himself; and the fact is that if the usuary does not hire out the woman's services but only expedites work which he has undertaken to do, she is considered to be working for him. Octavenus also approves this view.

13 GAIUS, *Provincial Edict, book 7:* However, Labeo holds that a slave or slave-woman can be constrained to pay money as a substitute for rendering service.

14 ULPIAN, *Sabinus, book 17:* If I stipulate or receive something by delivery through a slave in whom I have a right of use, do I acquire if the matter is in connection with my affairs or the services of the slave? If it is in connection with the slave's services, there will be no valid acquisition, as one is not entitled to hire out the services of such a slave. However, if the matter is in connection with my affairs, the rule is that a slave in whom I have a right of use will, by stipulating or taking delivery, acquire for me as, in this instance, I would be making use of his services. 1. Whether a legacy is one of usufruct or of a right to fruits makes no difference; a right to fruits includes a right of use, but a right of use does not include a right to fruits, and while there cannot be a right to fruits without a right of use, there can be a right of use without a right to fruits. Thus, if you are left a legacy of a right to fruits under reservation of the right of

use, Pomponius, in the fifth book of his *Sabinus*, tells us that the legacy is ineffectual. He also tells us that should a usufruct be left by way of legacy, but the right to fruits revoked, the whole legacy will be held to be revoked; but if the legacy is one of a right to fruits without the right of use, a right of use is held to have been created, since it could have been created at the outset. However, if a usufruct is left as a legacy and the right of use is revoked, Aristo holds that this is no revocation at all; this is the more equitable view. 2. If the right of use is left by way of legacy and the right to fruits is afterward left to the same person, Pomponius says that the latter is merged with the right of use. He also says that if the right of use is left to you by way of legacy, and the right to fruits to me, we are jointly entitled to the right of use, but that I alone will have the right to fruits. 3. It is possible for one person to have the right to use, another the right to fruits without the right of use, and a third the bare ownership, for example, where the owner of an estate leaves the right of use to Titius by way of legacy and his heir afterward leaves the right to fruits to you or creates it in some other way.

15 PAUL, *Sabinus, book 3:* If the right of use of an estate is left as a legacy, the usuary may take as provisions from the crops thereof as much as is required to meet his needs during the following year, but not more, even although the produce of an estate of average size should thereby be exhausted, this on the same principle that allows him to make use of a house or a slave in such a way as to leave nothing by way of fruits for anyone else. 1. Just as the legatee of the right of use of an estate cannot prevent the owner from frequenting it for the purpose of cultivating the land as otherwise he could prevent the owner from enjoying the fruits, so too the heir cannot do anything to prevent the legatee of the right of use from making use of the land in the way in which a careful head of a household ought to use it.

16 POMPONIUS, *Sabinus, book 5:* If the right of use of an estate is left by way of legacy on the terms that it is to be duly equipped, the legatee will be entitled to the use of those things which constitute the equipment of the land, just as if the right of use of the things themselves had been expressly left to him. 1. The owner is entitled to keep watch over the estate or the house through a bailiff or steward, even without the consent of the usufructuary or usuary, as it is in his interests to preserve the boundaries of his estate. All this applies, no matter how the usufruct or right of use was created. 2. If we have the right of use only of a slave, and not the right to fruits as well, it is possible for something to be given to him by us or for him to carry on a business funded by us on the understanding that whatever he acquires thereby shall count as a *peculium* derived from us.

17 AFRICANUS, *Questions, book 5:* If the right of use of a house is left as a legacy to a son-in-power or a slave, my opinion is that the legacy is valid and that the same kind of action lies to recover it as would lie if the right to the profits of the house had also been left. Consequently, the father or master may equally well live in the house when the son or slave is absent as when he is present.

18 PAUL, *Plautius, book 9:* If the right of use of a house is left as a legacy without the right to profits, the duty of carrying out repairs to the property so as to keep it protected against the elements is that of both the heir and usuary alike. Let us consider, however, whether it may not be the case that if the heir takes the profits, he and he alone is obliged to see to the repairs, but if the subject matter of the legacy of the right of use is such that the heir cannot take the profits, the legatee alone can be compelled to repair it. This distinction is a reasonable one to draw.

19 PAUL, *Vitellius, book 3:* A share of a right of use cannot be left as a legacy; one can have the partial enjoyment of property but not the partial use of it.

20 MARCELLUS, *Digest, book 13:* If I am left a legacy of the right of use of a slave, he

acquires for me if he is my business manager and I make use of his services in a shop; for he acquires for me by buying and selling goods. Further, he acquires for me if he takes delivery of something at my direction.

21 MODESTINUS, *Rules, book 2:* The right of use of water is a personal right and so cannot be transmitted to the heir of the usuary.

22 POMPONIUS, *Quintus Mucius, book 5:* The deified Hadrian, in a case in which the right of use of a wood was left as a legacy to certain persons, declared that the right to fruits should also be held to have been left to them, because, unless the legatees were permitted to fell timber and sell it, just as usufructuaries are permitted to do, they would get nothing by their legacy. 1. Even although a legatee to whom the right of use of a house has been left is in such straitened circumstances that he cannot take advantage of his right to use the whole house, still the owner cannot make use of those parts of it which are left unoccupied. The reason is that the usuary will be entitled to use the whole house from time to time as the need arises, since there are times when even the owner of a house uses some parts of it and not others, as occasion may demand. 2. If a right of use is left as a legacy and the legatee exercises his right to a greater extent than he ought to do, what does the duty of the judge, who determines how the right may be exercised, come to? He must see to it that the usuary does not exercise his right otherwise than the law allows.

23 PAUL, *Neratius, book 1:* NERATIUS: An owner cannot in any way change the nature of something of his which is subject to a right of use. PAUL: For he cannot make the position of the usuary worse, and he may make it worse, even where he improves the condition of the thing held in use.

9

THE WAY IN WHICH A USUFRUCTUARY SHOULD GIVE SECURITY

1 ULPIAN, *Edict, book 79:* Should the usufruct of anything be left as a legacy, it seemed to the praetor to be quite in accordance with justice that the legatee should give an undertaking on each of two counts: first, that he would make use of the thing in the way a careful man would think proper and second, that when the usufruct ceased to belong to him, he would restore what remained of the thing. 1. This stipulation ought to be made whether the subject matter of the usufruct is movable property or consists of land. 2. It should be understood that this procedure ought to be employed in the case of *fideicommissa* as well. Again, if a usufruct is created by a *mortis causa* gift, this *cautio* ought to be tendered on the analogy of the case of a legacy; and if the usufruct is created in any other way, the same rule applies. 3. The beneficiary must give an undertaking that the usufruct will be enjoyed as a careful man would enjoy it, that is to say, that he will not cause the value of the usufruct to deteriorate and that in all other respects, he will act as he would do in connection with his own affairs. 4. However, it is to the mutual advantage of both the heir and the legatee if, when the legatee enters into the enjoyment of his right, they have witnesses attest to the condition of the property at that time, so that it may thereby be apparent whether and to what extent the legatee has diminished its value. 5. It was considered more advisable that in this matter, the undertaking should be given by means of a stipulation so that if the beneficiary should use the thing otherwise than in accordance with the standards of a careful man, an action might be brought on the stipulation at once; and thus one does not have to wait until the termination of the usufruct. 6. This stipulation refers to two situations in which it may come into operation: first, where the usufructuary uses the thing in a way that a careful man would not think proper and second, where the usufruct falls to be restored. The first of these provisions comes into effect as soon as an improper use is made of the thing, and it may come into effect time and time again; the second comes into effect on the expiry of the usufruct. 7. To refer back to the statement that what remains of the thing will have to be restored: the

owner does not stipulate for the thing itself, as a stipulation for his own property would be held to be invalid; he merely stipulates for the restoration of what remains of it. Sometimes the appraised value of the property may be mentioned in the undertaking to cover such a contingency as a usufructuary neglecting to interrupt usucapion when he has the power to do so; for he undertakes to exercise every care over the thing.

2 PAUL, *Edict, book 75:* In fact, the usufructuary is obliged to accept responsibility for the custody of the thing.

3 ULPIAN, *Edict, book 79:* Now this stipulation covers each and every situation in which a usufruct is lost. 1. We may understand a usufruct as ceasing to belong to the party entitled even if, although left to him by way of legacy, it has not yet begun to belong to him, and the stipulation may nonetheless become actionable on the basis that a thing ceases to belong to a man to whom it has never begun to belong. 2. If, by the terms of a legacy, a usufruct is renewed every time it is lost, then unless the undertaking was drawn up so as to meet the case, the stipulation will become actionable, but a defense will have to be raised. 3. Again, suppose that a man leaves you a legacy of a usufruct and, subject to the condition of your having children, the bare ownership as well; should the usufruct be lost, the stipulation will become actionable, but a defense will be available. 4. If the heir alienates the bare property and the usufruct is afterward lost, let us consider whether he can bring an action on the stipulation. It may be said and justifiably so that at strict law the stipulation is not enforceable because the thing cannot be returned to the heir or his successors and the man to whom it can be returned—that is, the man who became owner—was not party to the stipulation. However, the latter, at the time when he acquires the ownership, should provide for the protection of his own position by means of a separate *cautio*; even if he does not do so, he can still resort to an action *in rem.*

4 VENULEIUS, *Stipulations, book 12:* Should the usufructuary acquire the bare ownership, the usufruct ceases to belong to him by reason of merger; but if an action on the stipulation is brought against him, the rule is that either the action is incompetent at strict law, if the standard of the careful man is considered as applicable even to this case, or that he will have to raise a defense based on the facts.

5 ULPIAN, *Edict, book 79:* Contained in this stipulation is an undertaking that no malicious fraud has been committed or will be committed, and, as this reference to malicious fraud is framed *in rem*, it is held to cover fraud on the part of anyone, be he a successor or an adoptive father. 1. If the right of use without the right to fruits is left as a legacy, the praetor orders security to be given with the reference to fruits being omitted. This is quite justified, as the aim is that security should be given with reference to the use only, and not the fruits as well. 2. Accordingly, if what is acquired is the right to fruits without the right of use, the stipulation will be applicable. 3. Again, if a right of habitation is bequeathed or the services of a slave or of some other living creature, the stipulation has place, even although these rights do not imitate usufruct in every respect.

6 PAUL, *Edict, book 75:* The same rule applies to the returns from a landed estate as, for example, where a vintage or a harvest has been left by way of legacy, just as things are taken as a result of a legacy of a usufruct, which revert to the heir on the death of the usufructuary.

7 ULPIAN, *Edict, book 79:* If a thing has been delivered on account of a usufruct but security has not been given, Proculus holds that the heir can bring an action to recover that thing, and if he is met with a defense on the grounds that the thing was delivered on account of a usufruct, he should raise a counterdefense. This opinion is sound, but a *condictio* can also be brought to have the stipulation itself given. 1. When the usufruct of a sum of money has been left as a legacy, the two contingencies contained in the words "to be given when you die or undergo a change of civil status" ought to be expressly mentioned in the stipulation. The reason why these two contingencies alone need be mentioned is that the use of money cannot be lost under any circumstances other than these.

8 PAUL, *Edict, book 75:* If the usufruct is left to you by way of legacy and the bare ownership to me, the undertaking must be given to me. However, if the bare ownership is left to me subject to a condition, some authorities, Marcian among them, are of the opinion that the undertaking should be given both to the heir and to me. This opinion is sound. Similarly, if the bare ownership is left to me and when it ceases to belong to me, to another, then again the undertaking should be given to both of us, as was held in the case discussed above. If the usufruct is left by way of legacy to two persons jointly, they will be obliged to give undertakings to each other and to the heir as well with express mention of the contingency referred to in the words "if the usufruct does not belong to my co-legatee, the same to be given up to the heir."

9 ULPIAN, *Edict, book 51:* If a usufruct is left to me by way of legacy and I am requested to make it over to Titius, who is obliged to give the undertaking is a point to consider; is it Titius or I myself as legatee? Or are we to say that the heir can bring an action against me and that I must bring one against the *fideicommissarius*? The more expeditious rule is as follows. If I continue to have any expectations with reference to the usufruct, so that when you [Titius] lose it, it may possibly revert to me—that is, to the legatee—the matter can be settled by your giving an undertaking to me and by my giving one to the bare owner. However, if the usufruct was left to me purely for the sake of the *fideicommissarius* and there is no prospect of it reverting to me, the *fideicommissarius* ought to give an undertaking to the bare owner directly. 1. It should be understood that whether a man has a usufruct by direct law or even through the protection of the praetor, he can in both cases alike be compelled to give the undertaking and to defend any actions brought. 2. But if someone is left a legacy of the bare ownership as from a given day and of the usufruct in absolute terms, Pomponius states that the rule is that the usufructuary should be exempted from giving the *cautio*, as it is certain that the bare ownership will come into his hands or those of his heir. 3. Pomponius tells us that if a usufruct of clothing is left as a legacy, then although the heir stipulates for the return of the clothing on the termination of the usufruct, still the promisor does not incur liability if he returns the clothing and, without malicous intent, it has been worn out. 4. If there are a number of bare owners, each of them will stipulate with reference to his own share.

10 PAUL, *Edict, book 40:* If we own a slave in common and I leave the usufruct of the man to you by way of legacy, the *cautio* will be required to protect my heir; for although, as regards the actual property, he can raise an action for dividing common property, still the matter of a usufruct which is exclusively yours falls outside the competence of the judge in such an action.

11 PAPINIAN, *Replies, book 7:* If the right of use of a house is bequeathed, a *cautio* ought to be proferred such as would prove satisfactory to a careful man; and it would make no difference if a father wished his sons, who were his heirs, to live in the house along with his widow, who was the legatee.

12 ULPIAN, *Sabinus, book 18:* If the usufruct bequeathed is in fact one of utensils, the *cautio* prescribed by the *senatus consultum* will not be required, but only one in the terms that the beneficiary "will use and enjoy in the way a careful man would think proper." Thus, if the utensils are delivered for the purposes of enjoyment, no one is in any doubt that they do not become the property of the recipient; the fact is that they were not delivered with the intention that the ownership should pass away from the transferor, but so that the legatee might have the use and enjoyment of them. Accordingly, as the utensils do not become the property of the usufructuary, the bare owner can bring an action to recover them, if the *cautio* is not given. A point to be considered is whether a *condictio* is available in this instance; in fact, it has been established that no one can recover his own property by means of a *condictio*, except from a thief.

BOOK EIGHT

1

SERVITUDES

1 MARCIAN, *Rules, book 3:* Servitudes attach either to persons, as in the case of the right of use and usufruct, or to things, as in the case of rustic and urban praedial servitudes.

2 ULPIAN, *Edict, book 17:* One of the owners of a house owned in common cannot by himself burden it with a servitude.

3 PAUL, *Edict, book 21:* Some praedial servitudes attach to the soil, others to the surface.

4 PAPINIAN, *Questions, book 7:* In strict accordance with the law, servitudes cannot be created to take effect from a given day or to last until a given day or subject to a condition-precedent or to last until a given conditional event (for example, as long as I choose). However, if such qualifications are attached, a person who sues to recover the servitude in the face of the terms agreed will be met with the defense of pact or of fraud. Cassius reports that this was the opinion of Sabinus, as well as being his own view. 1. It is agreed that servitudes can be qualified by express limitation, as by specifying what type of transport may or may not be used (for example, that a horse only be used) or that no more than a certain weight be conveyed or that a particular flock only be driven across or that charcoal is to be carried. 2. Should intervals of so many days or hours be specified, they do not relate to the question of when the servitude shall exist, but to the exercise of a legally created servitude.

5 GAIUS, *Provincial Edict, book 7: Via, iter, actus* and the right to channel water are created by more or less the same methods as those by which we have stated usufruct to be created. 1. The exercise of a servitude can be allotted to fixed times so that, for instance, a man may exercise his right only from the third to the tenth hour or on alternate days.

6 PAUL, *Edict, book 21:* A servitude can equally well be released as created with respect to a particular part only of an estate.

7 ULPIAN, *Lex Julia et Papia, book 13:* The right to lead a drain is a servitude.

8 PAUL, *Plautius, book 15:* A servitude cannot be created to allow us to gather fruit or to stroll or picnic on another's land. 1. Suppose your estate is servient to mine; if I become owner of a portion of your land or you of mine, the servitude is retained with respect to a part of the land, although it could not have been so acquired at the outset.

9 CELSUS, *Digest, book 5:* Suppose a man is granted or bequeathed a *via* without reservation over another's estate. He may walk and drive across it without restriction, that is to say, across any part of the estate he chooses, so long as he does so in a reasonable manner; for a general mode of expression is always subject to some tacit reservation. He need not be suffered to walk or drive through the homestead itself, or

amid the vineyards, as he could just as conveniently have gone another way with less damage to the servient estate. Indeed, it is settled that he ought to walk or drive only along the route he decided on at the outset and that he does not have the discretion to change it thereafter. Sabinus himself was of this opinion. He argued on the analogy of a watercourse which, he said, a man might lead where he pleased at the outset, but whose course he could not change once it had been determined. It is clear that this rule should also be observed in the case of a *via*.

10 CELSUS, *Digest, book 18:* If a man is left an *iter* by way of legacy and cannot exercise his right unless he does some construction work, then, according to Proculus, he is allowed to make a pathway by means of digging and laying foundations.

11 MODESTINUS, *Distinctions, book 6:* It is generally accepted that a servitude cannot be acquired in respect of a share of ownership. So if a man who has an estate stipulates for a *via* and afterward disposes of a share in his estate, he vitiates the stipulation, because he has brought about a situation in which the stipulation could not originally have been validly made. In the same way, a *via* cannot be left as a legacy or revoked in respect of a share of ownership. If this is done, neither the legacy nor the revocation has any effect.

12 JAVOLENUS, *Letters, book 4:* I am in no doubt that a servitude can be lawfully acquired through a slave for land belonging to a municipality.

13 POMPONIUS, *Quintus Mucius, book 14:* If a *via* is granted, but the place pointed out for it is so narrow that neither a vehicle nor a beast of burden can enter it, it will be held that an *iter* rather than a *via* or an *actus* has been acquired. However, if a beast of burden could be taken along it, but a vehicle could not, it will be held that an *actus* has been acquired.

14 PAUL, *Sabinus, book 15:* Rustic praedial servitudes, even though attached to corporeal property, are nevertheless incorporeal and so are never acquired by usucapion. Or the reason may be that the nature of these servitudes is such as not to engender clear and continuous possession. For no one can make use of a right of way in so continuous and uninterrupted a manner that his possession of it will be held to be unbroken. The same rule applies to urban praedial servitudes as well. 1. A servitude of *iter* affording access to a burial place remains a matter of private law, and so it can be surrendered to the owner of the servient estate. Such a servitude can even be acquired after the religious nature of the burial place has been established. 2. Should public ground or a public roadway lie between two estates, a servitude giving the right to draw water can still be created, although a servitude giving the right to channel water cannot. It is, however, the practice to petition the emperor for permission to lead a watercourse across a public roadway, as long as the public is not inconvenienced thereby. If it is sacred or religious ground that lies between the two estates, this prevents even a servitude of *iter* being created, because no one can be allowed a servitude over such ground.

15 POMPONIUS, *Sabinus, book 33:* Whenever a servitude is found not to be for the benefit of an individual or an estate, then it is of no effect in that no neighbor has any interest in it, as, for example, a servitude preventing you from walking across or occupying your own land. Thus, nothing is achieved if you grant me a servitude to the effect that you shall not have the right to use and enjoy your own land. It would, of course, be otherwise if the grant was to the effect that you should not have the right to obtain water from your own land at the expense of my supply. 1. It is not in keeping with the nature of servitudes that the servient owner be required to do something, such as to remove trees to make a view more pleasant or, for the same reason, to paint something on his land. He can only be required to allow something to be done or to refrain from doing something.

16 JULIAN, *Digest, book 49:* It is not unreasonable that a man who obtains an estate as security should be permitted to bring an *actio utilis* to protect a servitude attached to it, just as he will be permitted to bring an *actio utilis* to protect the estate itself. It is agreed that the same rule applies to a man who has a long lease of public land.

17 POMPONIUS, *Rules, sole book:* A part share of a *via, iter, actus,* or a right to channel water cannot be made the subject of an obligation, because the exercise of such rights is indivisible. So if a man who has stipulated for one of these rights dies, leaving a number of heirs, any one of them can sue for the whole servitude. Similarly, if a man who has promised to grant one of these servitudes dies, leaving a number of heirs, any one of them can be sued for the whole.

18 PAUL, *Note to Papinian, Questions, book 31:* In the case of every servitude which is extinguished by merger on the acceptance of an inheritance, it has been held that the defense of fraud will prevail against a legatee of the servient estate, should he not allow the servitude to be recreated.

19 LABEO, *Posthumous Works, Epitomized by Javolenus, book 4:* I am of the opinion that a man can impose a servitude on an estate which he is selling, even supposing the servitude affords him no benefit. For example, suppose it is of no advantage to a vendor to have at his disposal a right to channel water; notwithstanding, a servitude to this effect may be created. For there are some rights which we can have, even although they are of no advantage to us.

20 JAVOLENUS, *From the Posthumous Works of Labeo, book 5:* Whenever a *via* or any other right which attaches to land is being purchased, Labeo thinks that an undertaking should be given to the effect that you [the seller] will do nothing to the detriment of the exercise of that right, seeing that there can be no clear delivery of such a right. I myself think that the exercise of such a right should be regarded as the equivalent of a delivery of possession and that it is for this reason that interdicts have been created on the analogy of the possessory interdicts.

2

URBAN PRAEDIAL SERVITUDES

1 PAUL, *Edict, book 21:* If public ground or a public roadway lies between two estates, this does not prevent the existence of a servitude of *iter* or *actus* or one giving a right to build higher. But this situation does prevent the existence of a servitude giving a right to insert a beam or to have a roof or other structure projecting from a building or to discharge a flow of rainwater or rainwater dripping from the eaves of a house [hereafter eavesdrip]. The reason is that the air space above such ground must be kept clear. . 1. Suppose you have the usufruct and I have the bare ownership of a house which is burdened with a servitude of support for a neighbor's buildings. I can be sued in respect of the whole, and there is no right of action against you.

2 GAIUS, *Provincial Edict, book 7:* Urban praedial servitudes are as follows: the right to build higher and obstruct a neighbor's light or the right to prevent such building; the right to discharge eavesdrip on to a neighbor's roof or vacant ground or the right to prevent such discharge; the right to insert beams into a neighbor's wall; and, lastly, the right to have a roof or other structure projecting, as well as other similar rights.

3 ULPIAN, *Sabinus, book 29:* There can also be a servitude giving the right to have one's prospect unobstructed.

4 PAUL, *Institutes, book 2:* When a servitude giving a right to light is created, what is held to have been acquired is a right to the effect that a neighbor must respect our light. On the other hand, when a servitude preventing the obstruction of light is imposed, what we are mainly held to have acquired is a right that a neighbor shall not be entitled to raise the height of his building so as to decrease the access of light to our property.

5 ULPIAN, *Edict, book 17:* In connection with servitudes, when something is done against a man's wishes, we must not take this to mean that he openly objects, but that he does not give his consent. Thus, Pomponius asserts in his fortieth book that something can properly be said to be done against the wishes of an infant or a lunatic. The reason is that this expression does not refer to the deed but to the right conferred by the servitude.

6 GAIUS, *Provincial Edict, book 7:* As with rustic praedial servitudes, these rights are lost by nonuse over a specific period, except that there is the following difference. They are not lost by nonuse in every case, but are only lost if, at the same time, the servient proprietor acquires freedom from the servitude by lapse of time. Suppose, for example, your house is burdened with a servitude in favor of my house, preventing it from being raised in height, lest it obstruct my light; and suppose further that I keep an obstruction in front of my windows or keep them blocked up for the prescribed period. I lose my right only if you have raised and kept raised the height of your house throughout the same period. On the other hand, if you have made no alterations, I retain the servitude. Again, suppose your house is subject to a servitude allowing a beam to be inserted, and I remove the beam. I only lose my right if you stop up the hole from which the beam was taken, and keep things in this condition for the prescribed period. On the other hand, if you have made no alterations, the servitude remains unimpaired.

7 POMPONIUS, *Quintus Mucius, book 26:* As regards the assertion that I can succeed in obtaining freedom from a servitude for my building through lapse of time, Mucius quite rightly states that I would not achieve the same result if I kept a tree planted on that same spot. The reason is that a tree would not remain in its original condition and position, as would a wall, due to the natural movement of the tree.

8 GAIUS, *Provincial Edict, book 7:* Where natural law dictates a wall to be common property, neither of the two neighbors has the right to demolish and rebuild it, as he is not its sole owner.

9 ULPIAN, *Edict, book 53:* There is no right of action against a man who raises the height of his buildings so as to obstruct the access of light to a neighbor's house, if there is no servitude to prevent him so doing.

10 MARCELLUS, *Digest, book 4:* Gaurus to Marcellus: I have two houses and leave one of them to you as a legacy. My heir raises the height of the other house and obstructs your light. What action, if any, can you take against him? And do you think it relevant whether the house whose height he raised was his own property or the house which came with the inheritance? Further, I should like to know whether the heir is bound to furnish access through another house to the property which was left by legacy. A similar question is often asked when the usufruct of a site is left as a legacy and the site can only be reached by crossing someone else's land. Marcellus replied in the following way. If a man had two houses and left one of them as a legacy, there is no doubt that it is legally permissible for the heir to block the access of light to the house left as a legacy by raising the height of another house. The same must be said if a man bequeaths a house to one person and the usufruct of another house to another person. However, a similar conclusion does not always apply to the case of an *iter* on the grounds that a legacy of a usufruct is worthless without access to the site, whereas one can live in a house, even if the access of light to it is blocked. Indeed, when the usufruct of a site has been left as a legacy, access to the site must also be provided because, if the legacy had been one of a right to draw water, an *iter* for that purpose would also be given. On the other hand, in the case of obstructing light and thus darkening a house which has been left as a legacy, the following qualification is conceded. The light should not be blocked out entirely, but as much should remain as is sufficient for reasonable daily use of the property by the inhabitants.

11 ULPIAN, *Duties of Consul, book 1:* Should a man wish to obstruct his neighbors' light or construct anything else that will prove detrimental to their interests, he should bear in mind that he must keep the form and condition of the original buildings as they were. 1. If you and your neighbor are not agreed on the height to which you may raise buildings which you have undertaken to build, you can have an arbitrator appointed.

12 JAVOLENUS, *From Cassius, book 10:* When buildings are subject to a servitude that

no part of them be raised in height, it is permissible for shrubs to be placed on them, extending above the permitted height. However, this is not permissible if the servitude is one of prospect and the shrubs obstruct the view.

13 PROCULUS, *Letters, book 2:* A certain man, by the name of Hiberus, who has a tenement building at the rear of my warehouse, built a bathhouse next to our party wall. Now one is not permitted to have pipes for smoke positioned against a party wall in the same way as one cannot even have a wall of one's own built alongside such a wall. This rule applies with more force in the case of pipes for smoke as, because of them, the wall may be scorched by the heat of the fire. I would like you to talk to Hiberus about this matter, to prevent him doing something which is unlawful. Proculus replied: "In this case, I do not think Hiberus is in any doubt that he is acting illegally by constructing pipes for smoke against your party wall." 1. Following the opinion of Capito, it is permissible to put ornamental facing on a party wall, just as I am allowed to have the most valuable of frescoes on such a wall. However, if my neighbor demolishes the wall and proceedings are brought for threatened damage by an action on the stipulation, the frescoes ought to be valued at no more than those of the most ordinary type. This rule must also be applied with regard to the ornamental facing.

14 PAPIRIUS JUSTUS, *Imperial Rulings, book 1:* The Emperors Antoninus Augustus and Verus Augustus declared by rescript that in the case of vacant ground which is not burdened with a servitude, its owner or anyone else who has his consent may build on it, providing he leaves the statutory space between his building and a neighboring tenement building.

15 ULPIAN, *Sabinus, book 29:* A number of differences are recognized between the servitude preventing one from obstructing a neighbor's light and the servitude preventing one from spoiling his prospect. As regards the latter, the right of the dominant owner is more extensive in that nothing may be done to prevent him having a pleasant and unimpeded view. In the case of the former, on the other hand, the right is that the servient owner must not do anything to diminish the access of light to the other's property. Therefore, whatsoever the servient owner does that constitutes an obstruction to the access of the other's light can be stopped, if a servitude exists. He can also be given notice of new structure should he act in such a way as to interfere with the access of light.

16 PAUL, *Epitome of the Digest of Alfenus, book 2:* A right to light means that the sky should be visible. There is this difference between a right to light and a right of prospect. A right of prospect may exist over places on a lower level, but there can be no right to light over such a place.

17 ULPIAN, *Sabinus, book 29:* If the servient owner plants a tree so as to obstruct the dominant owner's light, he must be said, in all fairness, to have acted in contravention of the servitude imposed; even a tree can cause less of the sky to be visible. On the other hand, suppose what was planted does not interfere in any way with the access of light, but only keeps off the sun. If this affects a spot in which it is agreeable to be without the sun, it can be said that the servient owner has done nothing in contravention of the servitude. However, if this affects a sunroom or a sundial, the servient owner must be said to have acted in contravention of the servitude imposed, because he has put in the shade a spot for which sunlight was essential. 1. Conversely, if the servient owner removes a building or the branches of a tree with the result that a spot which was formerly in the shade is now fully exposed to the sun, he does not act in contravention of the servitude. He was bound to observe a servitude to the effect that he should not obstruct his neighbor's light; but, in this instance, he has not obstructed his neighbor's light, but afforded him more light than was strictly necessary. 2. Yet there are some cases in which it can be said that even a servient owner who pulls down a building or lowers its height does obstruct his neighbor's light, for example, where light found its way into his neighbor's house by reflection or in some such similar fashion. 3. A term in an agreement for the conveyance of a building in the words "the right to discharge eavesdrip to be as it is at present" means that neighboring proprietors are under the constraint of receiving such discharge and not that in addition, the buyer himself is to submit to such discharge from adjacent buildings. Thus, the seller undertakes that a servitude giving the right to discharge eavesdrip exists in his favor, but not that he is subject to a similar servitude in favor of a third party. 4. What has been written here about the servitude of discharging eavesdrip must also be taken to apply to all other servitudes, providing there is no express agreement to the contrary.

18 POMPONIUS, *Sabinus, book 10:* If your water pipes are laid against my house and cause me loss, an *actio in factum* is available to me; I can also require from you a stipulation in respect of threatened damage.

19 PAUL, *Sabinus, book 6:* Proculus holds that it is not lawful to have attached to a party wall a pipe which conducts either rainwater or water from a tank. On the other hand, one cannot prevent a neighbor from having a bathroom against a party wall, however much the wall may be affected by damp, any more than one could stop him from pouring out water in his own dining room or bedroom. However, Neratius holds that if the use of a warm bath is such as to result in continuous dampness and this proves harmful to a neighbor, it can be stopped. 1. One may lawfully have a tiled vault against a party wall, if it is so supported that it will remain in position even if the wall is taken down, so long as it does not interfere with the repair of the wall. 2. Sabinus quite properly wrote that I may place a set of steps against a party wall because this can be removed.

20 PAUL, *Sabinus, book 15:* Servitudes which are attached to the surface of the ground are retained by possession. If, for example, I have a beam from my house let into your house, then I possess the right to do so through the instrumentality of the beam. The same result will follow if I have a balcony extending over your ground or if I discharge rainwater dripping from the eaves of my house on to your land. The reason is that I am making use of something that is within your boundaries, and so I possess the right to do so, as it were, on the strength of the act. 1. Suppose your open ground is on a higher level than my house and that you have granted me a right of access on foot or by carriage across the ground to my house, but that there is no level approach to my house across the ground. If this is the case, I have a right to construct steps or a sloping approach to my door, so long as I do not disturb the ground beyond the extent necessary for the construction of the pathway. 2. If a building from which eavesdrip was discharged is taken down to be replaced by a building of the identical type and character, expediency demands that the latter be regarded as the same building as the one taken down. On the other hand, if the matter is construed more strictly, it is a different building that is put up in the second instance and so a usufruct of the first building will be lost if it is demolished, even although the site of a building is part of it. 3. If a servitude giving the right to discharge eavesdrip is created, the owner of the servient ground is not permitted to build on the spot on to which the discharge has started to fall. 4. If rainwater was originally discharged from tiles, it is not permissible subsequently to discharge it from board-work or any other material. 5. No matter what the restrictions were under which a right to discharge eavesdrip was acquired, the discharge may be made from a higher level. The reason is that the servitude is thus made less onerous, because water that drips from a height falls less forcibly and is at times diverted, nor does it always reach the servient ground. However, the discharge may not lawfully be made from a lower level, because this would make the servitude more onerous; in other words, instead of a discharge of raindrops, there would be a steady flow of rainwater. For the same reason, the discharge may be channeled backward, because it would then start to fall rather on the dominant land; but the discharge cannot be channeled forward, lest it fall on ground other than that which is burdened with the servitude. Thus, the discharge may lawfully be made less onerous, but not more so. In short, it must be understood that the position of the servient owner may be improved but not made worse, unless a provision allowing such alteration was specifically made when the servitude was created. 6. A man who builds on vacant ground which is subject to a servitude of receiving eavesdrip may extend his building right up to the place from which the discharge falls. Indeed, if the discharge falls on to the building itself, he may raise its height, providing the servitude is duly respected.

21 POMPONIUS, *Sabinus, book 33:* Suppose your house is burdened, in favor of my buildings, both with the servitude of not building higher and with the servitude of receiving eavesdrip from my buildings, and I grant you the right to raise the height of your house without my express consent. As far as my right to discharge eavesdrip is

concerned, the situation ought to be construed as follows. If it would be impossible for the discharge to fall on your buildings, should you raise them in height, then, for that reason, you are not permitted to do so. If the discharge would not be prevented from falling, you are free to raise the height of your buildings.

22 JULIAN, *From Minicius, book 2:* The owner of a building can impose on a neighboring proprietor a servitude requiring him to give an undertaking with reference not only to such lights as exist at present but also to those that may come into existence in the future.

23 POMPONIUS, *Sabinus, book 33:* If a servitude is created with the words "lights to remain as they are now," the correct interpretation seems to be that there is no provision in respect of future lights. However, if the undertaking is framed in the words "lights are not to be obstructed," this term does not make it clear whether only those lights which exist at present are not to be obstructed or whether future lights are included too. The more liberal interpretation is that as the term is a general one, it includes all lights, whether those presently in existence or those which come into existence after the date of the agreement. 1. A servitude can even be acquired for or imposed on a building which is planned, but has not yet been built.

24 PAUL, *Sabinus, book 15:* The owner of a building lawfully built over another has the right to build on top of his own structure to an unlimited extent, provided the lower buildings are not subjected to a more onerous servitude than they ought to bear.

25 POMPONIUS, *Sabinus, book 33:* The rule given above applies when something from one building is let into another because this is the only way in which someone can have a building over another which is not his. 1. Suppose there are three houses built on sloping ground. The house in the middle is burdened with a servitude in favor of the house higher up, while the lowest house is not subject to a servitude. A party wall which runs between the middle and the lowest of the houses is raised in height by the owner of the lowest house. Sabinus held that the owner of the lowest house could lawfully keep the wall at its new height.

26 PAUL, *Sabinus, book 15:* With regard to common property, neither of the owners can, by right of servitude, construct anything without the other's permission or prevent the other from constructing anything. The reason is that no one can have a servitude over his own property. Accordingly, considering the countless potential disputes, the property usually ends up as the subject matter of proceedings for division. However, by means of an action for dividing common property, one of the owners-in-common can achieve the result of preventing the other carrying out construction work or of having taken down what the other has built, so long as such removal is in their best joint interests.

27 POMPONIUS, *Sabinus, book 33:* Suppose, however, that you and I own the Titian house in common and something from it is let into another house which is my own property without there being a right to this effect. In this case, it may be assumed that I have a right to bring an action against you or to have the property divided between us. The result is the same if something is made to project from a house which is your property into the precincts of a house which you and I own in common; I have an action against you in my own name. 1. Should you want to build on vacant ground that you own in common with another, your fellow co-owner has the right to prevent you doing so, even if a neighboring proprietor has granted you the right to build. The reason is that you do not have the right to build on common property against the wishes of your fellow co-owner.

28 PAUL, *Sabinus, book 15:* It has been held that a hole at the bottom of the wall of a room or dining hall, designed for use in washing the floor, does not imply a right to discharge a steady flow of water, nor is it something to which a right can be acquired by lapse of time. This is the case, assuming no rainwater finds its way to the spot, because what is produced by a man's labor does not have a perpetual cause. On the other hand, although rainwater does not fall constantly, it still has a natural cause and so is deemed to be constantly produced. All praedial servitudes must be grounded on causes that perpetually exist. Thus, a servitude cannot be created giving the right to channel water from a water tank or standing pond. A natural and perpetual cause must also lie behind the right to discharge eavesdrip.

29 POMPONIUS, *Quintus Mucius, book 32:* Therefore, if an adjacent proprietor suffers any loss owing to an opening of the type mentioned above and the opening is not the subject of a servitude, it has to be said that this is a case for a stipulation against threatened damage.

30 PAUL, *Sabinus, book 15:* If a man acquires a house by conveyance after purchasing it, and

the house is burdened with a servitude in favor of another house of his, the servitude is extinguished by merger. Should he want to resell the house, the servitude must be expressly recreated, otherwise the house will be sold free of it. 1. If I acquire a share in an estate which is servient to my land or to which my land is servient, it is accepted that the servitude is not extinguished by merger, as a servitude is retained in respect of a share. Thus, if my estate is servient to your estate and you convey a share of your estate to me and I convey a share of mine to you, the servitude is kept up. Similarly, the acquisition of a usufruct in either of the two estates does not affect the servitude.

31 PAUL, *Edict, book 48:* Suppose an heir, who is obliged by the terms of a will not to obstruct a neighbor's light and to afford a servitude to this effect, pulls down the servient building. The legatee [the neighbor] must be allowed an *actio utilis* to stop the heir, should he later on attempt to raise the building beyond its former limits.

32 JULIAN, *Digest, book 7:* Suppose my house is servient to the house of Lucius Titius and the house of Publius Maevius to the effect that I may not raise its height. I request Titius to allow me to raise the height of my house, and I keep it in this condition for the prescribed period. In this case, I will acquire freedom from the servitude by lapse of time as against Publius Maevius. The reason is that Titius and Maevius do not each benefit from the same servitude, but from two servitudes respectively. In support of this proposition is the consideration that should one of them release me from the servitude, I would be free as far as he alone was concerned and would nonetheless be bound to observe the servitude in favor of the other. 1. Freedom from a servitude is acquired by lapse of time, providing possession of the house is retained [throughout the prescribed period]. Therefore, if a man who has raised the height of his house ceases to possess it before the prescribed period has elapsed, the acquisition of freedom from the servitude by this method is interrupted. Indeed, anyone else who later acquires possession of that house will only acquire freedom from the servitude by lapse of time by possession of it for the full prescribed period. In fact, the nature of servitudes is such that it is impossible to possess them, but whoever possesses a house is deemed to have possession of a servitude attaching to it.

33 PAUL, *Epitome of the Digest of Alfenus, book 5:* The duty of repairing a pillar, which provides support for an adjacent house by virtue of a servitude, is that of the owner of the servient, and not the dominant, house. Again, when a term in a contract for the sale of a house read, "the wall to continue to provide such support as it does at present," these words were sufficient to import a requirement that the wall be kept up permanently. Certainly, these words are not to be taken to mean that the wall which must be kept up permanently is to exist forever—that is plainly impossible—but to mean that there should always be a wall of the same kind to provide support. Similarly, suppose a man has given an undertaking to another to provide a servitude that will afford a right of support for that other's building. If the servient structure, which provides the support, should be destroyed, it would have to be replaced with another structure of the same type.

34 JULIAN, *From Minicius, book 2:* A man who has two tracts of vacant ground can, on the conveyance of one of them, impose a servitude on it in favor of the other.

35 MARCIAN, *Rules, book 3:* If the owner of two houses sells one of them and states that it is to be subject to a servitude, but makes no mention of the servitude when conveying the property, he can bring an action on the contract of sale or a *condictio* for an unascertained amount to have the servitude created.

36 PAPINIAN, *Questions, book 7:* A man had two houses under a single timber roof. He left each of the houses by legacy to two different people respectively. I said, on the grounds that it seemed the better view that the materials of a roof could be shared by two people to the extent that each own a determinate share of the whole structure, that in this case each of the legatees would be owner of the beams directly above his house. I also said that neither of them would have a right of action against the other to contest the right of one of them to insert a beam into the other's property. Nor would it make any difference whether the houses were left to each of them absolutely or whether the legacy to one of them was subject to a condition.

37 JULIAN, *Digest, book 7:* The above rule also applies if the owner of two such houses conveys them to two different people respectively.

38 PAUL, *Questions, book 2:* If my house is so far distant from your house that the one cannot be

seen from the other or if a hill situated between them blocks the view, a servitude cannot be created between them.

39 PAUL, *Handbook, book 1:* Indeed, no one can impose a servitude on his own buildings, unless both the grantor and the grantee have the buildings of the other within the compass of his view, so that it is possible for one of the buildings to impair the amenities of the other.

40 PAUL, *Replies, book 3:* I gave it as my opinion that those who did not have the right to admit light acted in an unauthorized way when they made an opening in a party wall and inserted windows in it.

41 SCAEVOLA, *Replies, book 1:* A testator left as a legacy to Olympicus for his lifetime the right of habitation of a particular house and the use of a storeroom which was in the house. Adjoining the house was a garden and an upper room, which were not included in the legacy to Olympicus. However, the means of access to the garden and the upper room had always been through the house which was the subject of the legacy. Is Olympicus bound to afford such access? I gave it as my opinion that the access in question certainly did not amount to a servitude, but that the heir was nevertheless entitled to pass through the house to the places mentioned above, so long as he did not inconvenience the legatee. 1. Lucius Titius made an opening in the wall of his house and opened a doorway onto public ground, in keeping with the limits indicated by the fall of eavesdrip and the projection of beams from his house. As he did not obstruct the light or access of his neighbor, Publius Maevius, or prevent the discharge of eavesdrip from his neighbor's house, does the said Publius Maevius, his neighbor, have any right of action to stop him so doing? I gave it as my opinion that on the facts stated, he had no right of action.

3

RUSTIC PRAEDIAL SERVITUDES

1 ULPIAN, *Institutes, book 2:* The following are rustic praedial servitudes: *iter*, *actus*, *via*, and *aquae ductus*. *Iter* is the right permitting a man to go on foot and to walk, but not to drive a beast of burden as well. *Actus* is the right to drive either a beast of burden or a vehicle. Thus, a man who has an *iter* does not have an *actus*, but a man who has an *actus* has an *iter* as well, even although the latter does not give the right to drive a beast of burden. *Via* is the right to go on foot, to drive, and to walk; in fact, *via* embraces both *iter* and *actus*. *Aquae ductus* is the right to channel water across another's land. 1. Within the category of rustic praedial servitudes must be included the right to draw water, the right to drive cattle to water, the right of pasture, the right to burn lime and the right to dig sand. 2. It is clear that conveyance and toleration of servitudes will attract the protection of the praetor.

2 NERATIUS, *Rules, book 4:* Rustic praedial servitudes include the right to raise the height of one's buildings and thus obstruct the light of a neighbor's mansion, the right to lead a drain beneath a neighbor's house or mansion, and the right to maintain a projecting roof. 1. The right to channel water or to draw water to be conducted by a watercourse across the same ground can, in fact, be granted to several individuals. It can even be stated that the right is to be exercised on different days or at different times. 2. If the supply of water for channeling or drawing water is sufficient, the right to channel water across the same ground can be granted to several individuals to the effect that each may exercise the right on the same days or during the same hours.

3 ULPIAN, *Edict, book 17:* Again, a servitude can be created to allow oxen, which are used for plowing a farm, to be pastured on a neighbor's field. Neratius tells us in the second book of his *Parchments* that just such a servitude can be created. 1. The same author also wrote that a servitude can be created to allow farm produce to be collected together and stored in a neighbor's building or to allow stakes for a vineyard to be taken from a neighbor's land. 2. In the same book, Neratius states that you can

grant a neighbor, whose stone quarries border your land, the right to throw earth, debris, and chunks of rock onto your ground and to leave them lying there or to let stones roll on to your land to be left where they lie and thence carted away. 3. A man who has a right to draw water is also presumed to have an *iter*, to enable him to exercise his right. As Neratius states in the third book of his *Parchments*, if a man is granted the right to draw water and a right of access for the purpose, he will have them both; if he is granted only the right to draw water, a right of access is also included; if he is only granted access to a spring, a right to draw water is included. These rules apply to the drawing of water from a private spring. However, with regard to a public river, Neratius tells us in the same book that, although an *iter* to it must be granted, a right to draw water from it need not be, and if a man grants only the right to draw water from it, this grant achieves nothing.

4 PAPINIAN, *Replies, book 2:* If the profits of an estate come mostly from animal husbandry, a servitude of pasturing livestock, like that of leading livestock to water, is held to attach to the estate rather than to an individual. However, should a testator single out a particular person to whom he wishes such a servitude to be given, the same servitude will not be available for the benefit of a subsequent purchaser of the land or to the aforesaid person's heir.

5 ULPIAN, *Edict, book 17:* Accordingly, in his opinion, a servitude can be vindicated. 1. Neratius states in *Books from Plautius* that a right to draw water or to lead livestock to water or to dig for clay or to burn lime on another's land cannot exist unless the beneficiary has an estate adjacent to that other's land. This, he stated, was the opinion of Proculus and Atilicinus. However, Neratius himself added that despite the fact that it is possible to create a servitude of burning lime or digging for clay, such a servitude cannot be granted beyond the extent necessary for the requirements of the dominant estate.

6 PAUL, *Plautius, book 15:* Such a requirement might exist, for example, if a man has a pottery where the containers used to carry away the produce of his farm are made (just as on some estates it is the practice to carry wine away in jars or to manufacture vats) or where tiles are made to be used in building his country house. However, if the pottery is used to manufacture vessels for sale, this will amount to usufruct. 1. Similarly, the right to burn lime or to quarry stone or to dig sand for the purpose of building something that is to be constructed on an estate falls far short of usufruct, as does the right to take timber that is ready for cutting to ensure that supports for vines should not be wanting. What, then, if such rights enhance the value of an estate? It cannot be doubted that they may still be the subject of a servitude. Maecianus approves this view to the extent that it is his opinion that a servitude can actually be created which will allow me to have a hut on your land, that is to say, assuming I already have a servitude of pasture or of watering cattle, to enable me to have a refuge should a storm break.

7 PAUL, *Edict, book 21:* A man who is conveyed on a sedan chair or in a litter is held to go on foot and not to drive, but a man who has an *iter* only is not entitled to lead a beast of burden. A man who has an *actus* is entitled to drive a wagon and to lead beasts of burden. However, neither the man who has an *iter* nor the man who has an *actus* has the right to drag rocks or timber. Some think that neither of them is permitted to carry a spear upright on the grounds that he would not be doing so as a concomitant of his right to walk or drive; besides, crops might be damaged by this. A man who has a *via* also has the right to go on foot and to drive, and most are of the opinion that he has the right to drag things and also to carry a spear upright, providing he does no damage to crops. 1. In the case of rustic estates, however, the presence of a third estate, not burdened with a servitude and lying between the two estates concerned, does prevent the existence of a servitude.

8 GAIUS, *Provincial Edict, book 7:* As regulated by the *Twelve Tables*, the width of a *via* is to be eight feet where the road is straight, and sixteen feet on an *anfractus*, that is, where there is a bend in the road.

9 PAUL, *Views, book 1:* A servitude of channeling water or of drawing water cannot be created unless the water is taken from source or from a spring. At present, however, it is the practice to create such servitudes to start at any point whatsoever.

10 PAUL, *Edict, book 49:* Labeo holds that a servitude can be created to allow a man to search for water and to channel it when found. Indeed, if one may create a servitude in respect of a building which has yet to be constructed, why should it not equally be permissible to create a similar right in respect of water that has yet to be found? If we can grant the right to search for water, the right to channel water that has been found can be granted as well.

11 CELSUS, *Digest, book 27:* When an estate has a number of owners, the right to walk or drive across it can be granted to me by each of the owners individually. Strictly interpreted, this means I will not acquire the right unless all the owners grant it, and then not until the final grant ratifies those which preceded it. However, the more liberal construction is that even before the last of the owners makes the grant, those who have previously done so cannot prevent me from exercising the right thus granted.

12 MODESTINUS, *Distinctions, book 9:* There is no small difference between an *actus* and an *iter*. An *iter* is a route along which a man may come and go on foot or on horseback, while it is an *actus* where he is permitted to drive cattle or take a vehicle.

13 JAVOLENUS, *From Cassius, book 10:* A servitude can be acquired for a particular type of estate, for example, a vineyard, because in this case the right attaches to the soil rather than to the surface. For this reason, the servitude remains in force, even if the vineyard is removed. However, if a provision to the contrary was made when the servitude was created, what will be needed will be a defense of fraud. 1. If an entire estate is subject to a servitude of *iter* or *actus*, the owner of the estate is not entitled to do anything on the land that would hinder the exercise of the servitude, as it extends over so wide an area that every clod of earth is subject to it. Again, suppose an *iter* or an *actus* is left by legacy without any indication of its bounds. Such bounds will have to be determined immediately, and the servitude will attach to the route assigned to it at the outset; the rest of the estate will not be affected by it. Accordingly, an arbitrator must be appointed, whose duty in either case is to delineate the route. 2. The width of an *iter* or an *actus* is to be as indicated, while if no such indication was given, the matter is to be settled by the arbitrator. The rule is otherwise with respect to *via* in that the statutory measurements should apply if no width was stated. 3. If part of an estate is designated for the purposes of such a servitude, but there is no specification as to width, one may cross the ground wherever one chooses. If, however, there is no designation of such a part as well as no specification as to width, one route across any part of the estate may be chosen, provided that its width complies with the statutory limits. Should there be any doubt over the determination of the route, the matter must go to arbitration.

14 POMPONIUS, *Quintus Mucius, book 32:* If I grant a *via* along a particular route to one person, I cannot grant someone else the right to channel water along the same route. Similarly, if I grant the right to channel water to one person, I cannot sell or otherwise grant an *iter* over that same route to another person.

15 POMPONIUS, *Quintus Mucius, book 31:* Quintus Mucius tells us that when a man has a watercourse across another man's estate, the supply of water being used daily or in the summer or over longer intervals, he is permitted to lay in the channel a conduit of his own, be it of earthenware or any other kind of material, to obtain a wider diffusion of the water. He is also permitted to construct whatever he wishes in the channel, providing he does not make the watercourse less advantageous to the servient owner.

16 CALLISTRATUS, *Judicial Examinations, book 3:* The deified Pius declared in a rescript to bird catchers that it was not reasonable for them to go fowling on other people's land without the permission of the landowner.

17 PAPIRIUS JUSTUS, *Imperial Rulings, book 1:* The Emperors Antoninus Augustus and Verus Augustus laid down in a rescript that for the purposes of irrigating fields, water from a public river ought to be allotted in proportion to the size of those fields,

unless anyone could establish that he should be allowed more than his proportionate share because of some special right of his. They further laid down that a man is only permitted to channel water if this can be done without wrong to another.

18 ULPIAN, *Sabinus, book 14:* Even if a *via* is created over a number of estates, the roadway still forms a single unit, as there is but one servitude. What, then, if I come and go across one of the estates but do not cross another of them during that period of time, the lapse of which extinguishes a servitude? Do I retain my right? The better view is that either the whole servitude is lost or the whole retained. Thus, if I do not exercise my right over any of the estates, the whole servitude is lost; if I exercise it over one of the estates only, the whole servitude is still kept up.

19 PAUL, *Sabinus, book 6:* If one of a number of co-owners should stipulate for an *iter* to the common property, the stipulation is invalid, as the servitude could not be granted to him. However, if they all stipulate or a slave owned in common by them stipulates, each of the co-owners can bring an action to enforce the grant of the right to him, because it is possible to grant the servitude to them all in this way. Otherwise, it would follow that if a man, who stipulated for a *via*, died and left a number of heirs, his stipulation would become invalid.

20 POMPONIUS, *Sabinus, book 33:* Suppose that at one and the same time you grant me both the right to walk and drive across your land and the usufruct of it and that subsequently I surrender my usufruct to you. You will only be able to use the land and take its produce if I am duly permitted to exercise my right of way. Similarly, suppose that I have a right to channel water across your land and that you are not entitled to build on the land without my permission. Should I allow you the right to build, you must nonetheless afford me a servitude to the effect that you may build only if my watercourse is preserved. The whole state of things ought to be as it would have been if, at the outset, only one grant had been made. 1. It is permissible for a servitude to cause damage to the servient estate due to something produced by natural causes, though not due to something produced artificially. An example would be if the level of water in a channel was increased by rainfall or by water flowing into it from the surrounding fields or by the subsequent discovery of a spring next to it or even in it. 2. Suppose I have a right to channel water across the Seian estate, the water being taken from a spring adjacent to that estate. Should I acquire the Seian estate, the servitude is still kept up. 3. The right to draw water does not attach to a person but to an estate.

21 PAUL, *Sabinus, book 15:* If you grant me a watercourse across your land without designating which particular part of the land I am to channel the water across, your whole estate will be subject to the servitude.

22 POMPONIUS, *Sabinus, book 33:* However, only those parts of the estate which were not taken up with buildings, trees, or vines at the time when the grant took effect will be subject to the servitude.

23 PAUL, *Sabinus, book 15:* It is possible to create a *via* to be wider or narrower than eight feet, providing, however, that it is of a width which permits the passage of a vehicle; otherwise, it will be an *iter* and not a *via*. 1. If there is a permanent lake on your land, a servitude of boating across it can be created, to allow access to a neighboring estate. 2. Should either a servient or a dominant estate become public property, the servitude remains in existence in either case, because any estate which becomes public property does so in its existing condition. 3. Any servitude that exists in favor of an estate exists in favor of every part of that estate. Consequently, even if the estate is sold bit by bit, the servitude goes with every portion of it with the result that each individual owner has a right of action to claim that he has a right of way. However, if the dominant estate is divided out in specific lots among a number of owners, then, although the servitude attaches to each lot individually, it is still necessary that those owners, whose plots do not adjoin the servient estate, should have a right of passage across the other parts of the estate thus divided up or that they should be able to cross with the consent of the owners of the adjoining plots.

24 POMPONIUS, *Sabinus, book 33:* Labeo states that if I have a right to channel water, I can oblige any neighbor I choose with the use of the watercourse. Proculus, on the other hand,

holds that I cannot even use it for the benefit of any part of my estate other than that for which the servitude was acquired. The view of Proculus is the sounder.

25 POMPONIUS, *Sabinus, book 34:* If I sell you a particular part of my estate, a right to channel water, attaching to the estate, will go to you as well, even if the right is most often exercised for the benefit of some other part of the land. In this case, there is no need to take into account the quality of the soil or the use made of the water, to the end that the right to channel water should attach only to that part of the estate which is the most valuable or on which the use of the water is most often needed. The rule is that the division of the water is to be in proportion to the extent of the fields retained and conveyed respectively.

26 PAUL, *Edict, book 47:* If either a *via*, an *iter*, an *actus*, or a right to channel water across an estate is left as a legacy without further instructions, the heir is entitled to subject any part of the estate he chooses to the servitude, provided only that the legatee is not prejudiced as regards the servitude.

27 JULIAN, *Digest, book 7:* Suppose the Sempronian estate is burdened with a servitude in favor of an estate owned by you and me in common. Should we purchase the Sempronian estate, to be held as our common property, the servitude is extinguished. The reason is that both the co-owners now have the same rights over each of the estates. However, suppose the estate purchased was burdened with a servitude in favor of an estate which was my own property and in favor of an estate of yours. In this case, the servitude is kept up, because a servitude over an estate owned in common can exist for the benefit of an estate which is the exclusive property of one of the co-owners.

28 JULIAN, *Digest, book 34:* If an *iter* is left as a legacy to give access to an estate which is owned in common by two people, then, unless each of the co-owners is in agreement as to the course of the *iter*, the servitude is neither acquired nor lost.

29 PAUL, *Epitome of the Digest of Alfenus, book 2:* A man who had two estates adjoining one another sold the higher of them. In the contract of sale, it was provided that the purchaser should be permitted as of right to drain water away on to the lower estate by means of an open ditch. Suppose the purchaser receives water from another estate and wants to discharge it onto the lower estate. Can he do so within the terms of the right he acquired or not? My opinion is that the lower estate of his neighbor is only bound to receive such water as the purchaser discharges for the purpose of draining his own estate.

30 PAUL, *Epitome of the Digest of Alfenus, book 4:* A man who had two estates sold one of them, reserving the use of water, the source of which was on the estate sold, and an area of ten feet around the source. It was asked whether the seller was owner of that area or whether he only had a right of access across it. The opinion given was that if the reservation was framed in the terms, "ten feet around that water," then the seller should only be held to have a right of access.

31 JULIAN, *From Minicius, book 2:* Three estates which were the property of three owners respectively were situated next to one another. The owner of the lowest estate acquired a servitude giving the right to take water for it from the highest estate and, with the consent of its owner, he channeled water across the middle estate to his own land. Later he purchased the highest estate, and then he sold the lowest estate on to which he had channeled the water. It was asked whether the lowest estate had lost its aforesaid right to take water on the grounds that as each of the two estates had become the property of the same man, there could be no servitude between two such estates. It was held that the servitude was not lost, because the intervening estate, through which the water was channeled, belonged to someone else, just as a servitude giving the right to channel water to the lowest estate could only be imposed on the highest estate if the water was also channeled over the intervening estate, so the same servitude, once attaching to the lowest estate, could only be lost if, at the same time, the water ceased to be channeled over the intervening estate as well or if all three of the estates became the property of the one owner.

32 AFRICANUS, *Questions, book 6:* You and I are co-owners of an estate. You convey your share to me, along with a *via* to the estate across a neighboring property of yours. Our authority affirms that a servitude is validly constituted by this method and that although it is normally held that servitudes cannot be acquired or imposed in respect of a share, the rule does not apply in this instance. In fact, in this case, the servitude is not acquired in respect of a share in that it is acquired with reference to a time when the estate will be my property alone.

3 AFRICANUS, *Questions, book 9:* You and I owned two estates, the Titian and the Seian, in common. We agreed to make a division of the common property to the effect that the Seian estate should go to you and the Titian estate to me. We conveyed our respective shares in the two estates to each other, and in doing so, it was provided that each of us should have a right to channel water across the estate of the other. Our authority affirms that the servitude was validly constituted, especially if the pact was fortified with a stipulation. 1. You are channeling water across the estates of a number of owners by virtue of a servitude, however created. You cannot grant the right to draw water from the channel to any of those owners whom you chose or to another neighboring proprietor, unless a pact or stipulation was added to this effect. Such a right is normally granted by the addition of a pact or stipulation, although, of course, no estate can be the subject of a servitude in favor of itself, nor is it possible to create a usufruct of a servitude.

4 PAPINIAN, *Questions, book 7:* One of the co-owners of an estate achieves nothing by granting an *iter* or an *actus*. Thus, suppose two estates which are servient to each other become the property of the same two owners. As the rule is that servitudes are retained in respect of a part share, one of the owners cannot release the servitude to the other. Although each of the co-owners, as an individual, is entitled to benefit from the servitude, nevertheless, as servitudes do not burden individuals but estates, freedom from the servitude cannot be acquired, nor can the servitude be released, as regards a share. 1. Suppose that a spring from which I have a right to channel water dries up but that it begins to flow again after the period prescribed for the extinction of a servitude has elapsed. Has my right to channel water been lost?

5 PAUL, *Plautius, book 15:* As to this question, Atilicinus notes that the emperor issued a rescript in the following terms to Statilius Taurus: "The men who were accustomed to channel water from the Sutrine estate approached me and stated that they could no longer channel the water of which they had had the use for a number of years from a spring on the Sutrine estate, because the spring had dried up. They also brought it to my attention that, later on, water from the spring had begun to flow again. Their petition to me was that their right should be restored to them on the grounds that they had not lost it through any neglect or fault on their part, but because it had become impossible to obtain water. As their petition did not seem unjust to me, I held that they should be assisted. Accordingly, my decision is that the right which they had on the day when it first became impossible for them to obtain a supply of water should be restored to them."

6 PAUL, *Replies, book 2:* When a servitude of channeling water was imposed on one of two estates which a seller retained on the sale of the other, the servitude thus acquired for the estate which was purchased passes with it on any subsequent sale of that estate; nor is it relevant in this context that a stipulation in which it was agreed to undertake to pay a penalty referred to the seller by name in providing for the case of his being prevented from enjoying his right.

7 PAUL, *Replies, book 3:* "Lucius Titius sends best wishes to his brother, Gaius Seius. I give and grant to you, to the depth of one inch, the water which flows into the reservoir made by my father on the isthmus, to channel into your house on the isthmus or wherever else you like." On the strength of these terms, does the use of the water go to the heirs of Gaius Seius as well? Paul replied that as the use of the water was personal to Seius, he being in the position of a usuary, it should not go to his heirs.

8 PAUL, *Handbook, book 1:* A *via* can be created, even if a river cuts across it, providing either that the river can be crossed at a ford or that there is a bridge over it. The position is otherwise if the river has to be crossed by boat. This rule applies on the assumption that the river flows across lands which are the property of one and the same person. On the other hand, suppose your lands are adjacent to mine and next to your land there is a river and then lands belonging to Titius and then a public roadway to which I want to obtain a right of way. Let us consider if there is anything to prevent you granting me a *via* up to the river and then Titius granting me one up to the public roadway. Further, let us reflect whether the legal position would be the same, even if you were owner of the lands on the other side of the river, lying between it and the public roadway, as a *via* generally extends only as far as some town or up to a public roadway or to a river which is crossed by boat or to some other estate belonging to the same [dominant]

owner. If this is the case, the servitude is not held to be interrupted, even although a public river flows between two estates owned by the same person.

4

RULES COMMON TO BOTH RUSTIC AND URBAN ESTATES

1 ULPIAN, *Institutes, book 2:* Buildings are termed urban estates; moreover, even if buildings form part of a country estate, urban praedial servitudes can still be created. 1. These servitudes are called praedial, because they cannot be created unless there is an estate. In fact, no one can acquire either a rustic or an urban praedial servitude, nor can anyone be bound to honor such a servitude, unless he himself has an estate.

2 ULPIAN, *Edict, book 17:* With regard to the taking or drawing of water from a river by means of a wheel or the case of someone creating a servitude over a cistern, some have expressed doubt as to whether these were servitudes at all. However, in a rescript of the Emperor Antoninus addressed to Tullianus, the proviso was added that although a servitude of this type was not legally valid, still if someone had acquired such a right by an agreement to the end in question or obtained it in any other lawful way, then the person who possessed such a right must be protected.

3 GAIUS, *Provincial Edict, book 7:* If the owner of two estates conveys one of them to you on the terms that the estate which is conveyed is to be bound by a servitude in favor of the estate which he retains or vice versa, a servitude is held to be legally created.

4 JAVOLENUS, *From Cassius, book 10:* It is not possible to make a legal provision to the effect that a religious monument shall not be built so as to exceed a stated height, because anything that ceases to be governed by human law cannot be subjected to a servitude. Similarly, there can be no servitude to the effect that a specified number of corpses only may be buried in one piece of ground.

5 JAVOLENUS, *Letters, book 2:* I am selling some land of mine; can I burden it with a servitude to be of benefit both to me and to a neighbor? Similarly, if I am selling land which I own in common with another, can I effect the creation of a servitude over it in favor of me and my fellow co-owner? My reply is that a man can only reserve a servitude for himself and for no one else. Thus, the addition of a proviso in favor of a neighbor must be considered as redundant with the result that the whole servitude belongs to the man who reserved it. Further, on the sale of land owned in common, I cannot effect the creation of a servitude over it in favor of me and my fellow co-owner, because a servitude cannot be acquired for land owned in common through an act of one of the co-owners.

6 ULPIAN, *Sabinus, book 28:* If a man has two houses and conveys away one of them, he can state as a term of the conveyance either that the house which is not conveyed is to be servient to that which is conveyed or, conversely, that the house which is conveyed is to be servient to the house retained. It is of little importance whether the two houses are adjacent or not. The same rule will also apply in relation to rustic estates; if a man has two estates, he can create a servitude over one in favor of the other by the terms of his conveyance. However, should he convey the two houses at the same time, he cannot impose a servitude over one in favor of the other, because he can neither acquire a servitude for, nor impose a servitude on, another's house. 1. If a man conveys away a share of a house or an estate, he cannot subject it to a servitude, because servitudes cannot be imposed with respect to shares, nor can they be thus acquired. Clearly, if he divides the estate into two by marking out boundaries and conveys, as a separate unit, one of the sections thus marked out, he can subject either part of the estate to a servitude. In fact, each part does not count as a share of the estate, but as an estate in its own right. The same reasoning can be applied to the case of a house, should an owner, by constructing a wall through the middle of his building, divide one house into two, as many, in fact, do. Here, too, the building must be counted as two separate houses. 2. Similarly, suppose there are two of us who are co-owners of two houses. We can achieve the same result by a joint conveyance as I could alone, were I the sole owner of the two houses. Even if we each make a separate conveyance, the outcome is the same, but with the difference that the final coveyance gives legal effect to the earlier grant. 3. If, however, one of the two houses is the absolute property of one of us, and

we own the other in common, Pomponius states in the eighth book of *Sabinus* that I cannot subject either of them to a servitude or acquire a servitude for either of them. 3a. If a man states in a contract of sale that the house he is selling is to be subject to a servitude, he is not obliged to convey the house unencumbered by any servitude. Therefore, he can subject the house he is conveying to a servitude in favor of his own house or grant a servitude to a neighbor, so long as he does so before the conveyance is made. Clearly, if he states that the house to be conveyed is to be subject to a servitude in favor of Titius and he grants a servitude to Titius, the matter is at an end; however, if he grants the servitude to some other person, he will be liable to an action on the sale. These observations are not incompatible with the comments of Marcellus in the sixth book of his *Digest*. He posed the following question: Suppose, on conveying an estate, a man stated that it was subject to a servitude in favor of Titius, when, in fact, the land was not thus burdened, but the seller was under an obligation to Titius to create the servitude, can the seller bring an action on the contract of sale to have the purchaser submit to the imposition of the servitude on the estate which he bought? Marcellus thought the better view was that such an action should be allowed. Marcellus also comments that even if the seller were able to sell the servitude to Titius, an action must similarly be allowed. These considerations only apply if a statement was made at the conveyance for the express purpose of reserving the servitude. On the other hand, as Marcellus says, if the seller only suspected that a servitude might be owing to Titius and made a provision on that account, then there will be no action on the contract of sale if he did not actually promise the servitude to Titius.

7 PAUL, *Sabinus, book 5:* If a man who owns two houses conveys one of them, he should expressly state the precise servitude he wishes to reserve. Otherwise, if the house conveyed is stated in general terms to be subject to a servitude, either this statement will be ineffectual, because it is unclear precisely what the servitude is that is reserved, or it will import an obligation for the imposition of each and every type of servitude. 1. A servitude can be imposed even if a house belonging to a third party lies between the dominant and servient houses, for example, a right to build higher or to prevent the other from building higher or even an *iter* on the terms that the grant shall only take effect if, at some future date, a similar servitude is imposed on the intervening house, just as a servitude can be created over the estates of a number of different owners and that even at different times. If I own three estates which form a continuous whole and I convey the estate at one end to you, it can still be said that a servitude can be acquired either for the estate conveyed to you or for my remaining two estates. However, if the servitude is acquired for the estate furthest from yours, which I retain, it is still effective because the intervening estate is my property; but should I later alienate either the estate for which the servitude was acquired or the intervening estate, the exercise of the right will be barred until a servitude is created over the intervening estate.

8 POMPONIUS, *Sabinus, book 8:* I have two tenement properties and I convey them at the same time to two men respectively. It should be considered whether a servitude thereby imposed on either of the two buildings is valid, because of the rule that a servitude cannot be imposed on, or acquired for, the house of another. However, as long as the transaction is not completed, the man making the conveyance acquires the servitude for, or imposes it on, his own house rather than the house of another, and so the servitude will be valid.

9 POMPONIUS, *Sabinus, book 10:* If I become heir to a man whose estate was servient to mine and I then sell the inheritance to you, the servitude ought to be re-established, to exist as it did formerly, because the understanding is that you are considered as if you actually were the heir of the deceased.

10 ULPIAN, *Sabinus, book 10:* Any servitude that a seller wishes to reserve for himself must be expressly reserved. A general reservation in the terms "those who have servitudes are to retain them" refers to third parties only and makes no provision in favor of the seller himself for the preservation of his rights. In fact, the seller had no rights, because no one can be subject to a servitude in favor of himself. Indeed, even if a servitude once existed in my favor and I then became owner of the servient estate, the servitude is held to be extinguished as a result.

11 POMPONIUS, *Sabinus, book 33:* Those with a right of servitude are permitted freedom of access, for the purpose of carrying out repairs, to those parts of the land which are not burdened with the servitude, but access to which is essential for them, unless limits as to access were

expressly stated when the servitude was created. Accordingly, the owner of the servient land cannot make religious the ground beside a water channel, or the ground over it (supposing that the water is channeled underground) in case the servitude should be lost. This view is good law. Further, you are entitled to raise or lower a channel through which you have a right to conduct water, unless an undertaking was given that you would not do so. 1. If I have a right to conduct water through a channel close to your land, the following rights are also tacitly implied: that I be permitted to repair the channel; that both my workmen and I shall have access by the nearest route for the purpose of these repairs; that the owner of the land shall leave me a piece of free ground across which I can approach the channel, both on its left and right sides, and onto which I can throw earth, mud, stones, sand, and chalk.

12 PAUL, *Sabinus, book 15:* If one estate is servient to another, the servitude passes with the land on the sale of either of the estates. If a building is servient to an estate or an estate to a building, the same rule applies.

13 ULPIAN, *Opinions, book 6:* The seller of the Geronian estate made it a term of the contract of sale in favor of the Botrian estate, which he retained, that no tunny fishing should be carried on off the latter. Now a servitude cannot be imposed by private agreement on the sea, as by nature it is open to all. However, because the good faith of the contract demands that the terms of a sale be honored, those persons who are in possession or those who succeed to their legal position are bound by the terms of the stipulation or the sale. 1. If it is established that there are stone quarries on your land, then, without your permission, no one who does not have a right to do so can quarry stone, either in a private capacity or in the name of the state, that is, unless a custom exists in respect of those quarries to the effect that if anyone wishes to quarry stone from them, he may do so, providing he first of all gives the owner the usual indemnification in consideration thereof. Even then, he can only quarry stone if he has first of all given security to the owner that the latter will not be prevented from using such stone as he requires and that his enjoyment of his property will not be spoiled by the exercise of this right.

14 JULIAN, *Digest, book 41:* There is nothing to prevent the creation of an *iter* on the terms that it may only be used during the hours of daylight. In fact, such a restriction is virtually a necessity in the case of urban estates.

15 PAUL, *Epitome of the Digest of Alfenus, book 1:* Where a man has granted an *iter* or *actus* across a particular piece of ground to another, there is no doubt that he can grant either of these rights across the same ground to a number of people. Similarly, if a man has burdened his house with a servitude in favor of his neighbor, he can nonetheless burden the same house with a similar servitude in favor of as many others as he pleases.

16 GAIUS, *Common Matters or Golden Words, book 2:* By the terms of his will, a man can oblige his heir not to raise the height of his house, so as to avoid obstructing the light of a neighboring house, or oblige him to allow his neighbor to insert a beam into his wall or to discharge eavesdrip onto his premises or to permit his neighbor to walk or drive across his land or channel water from it.

17 PAPINIAN, *Questions, book 7:* Suppose your neighbor extends a wall on to your land by your leave and license. No proceedings can be taken against him by way of the interdict *quod precario habet*; nor will the construction of the wall be construed as the completion of a gift of a servitude; nor can your neighbor validly claim at law that he has a right to keep the wall up without your permission, since the fact that a building takes on the legal character of the ground beneath it would make his claim a nullity. On the other hand, suppose a man who was bound to observe a servitude in your favor extends a wall across his own land by your leave and license. He will not acquire freedom from the servitude by lapse of time, and proceedings can usefully be taken against him by way of the interdict *quod precario habet.* If, however, you permit him by way of a gift to construct the wall, you cannot proceed against him by way of the interdict and your servitude will be extinguished as a result of this gift.

18 PAUL, *Handbook, book 1:* It is accepted that several co-owners may impose a servitude on their estate, even if they do not all make the grant at one and the same time, or that they may acquire one for it. However, the rule is that the earlier grants take effect only when the last

grant is made, so that it is as if all the co-owners had made the grant at the same time. Thus, if the man who made the first grant should die or dispose of his share of the estate in some other method or manner and his fellow co-owner makes the grant thereafter, nothing is accomplished. The reason is that when the last man makes the grant, the acquisition of the servitude is not held to be retroactive; the matter is construed as it would be if, when the last man made the grant, all the co-owners had done likewise. Therefore, the final grant in question will be in suspense until the new co-owner makes the grant. The rule is the same if the grant is made to one of the co-owners and then circumstances such as those described above occur with respect to another of the co-owners. Thus, on the other hand, if some such event affects a co-owner who has not made the grant, they will all have to make the grant anew; in fact, they are allowed so much time in which they can make the grant, as to be able to do so even at different times, and so the grant cannot be made to one person or by one person. A similar rule applies if one man grants a servitude and another leaves it as a legacy; for if all the co-owners bequeath a servitude and the inheritance of each of them is entered at the same time, it may be said that the legacy is effective. However, if the estates are entered at different times, there is no valid vesting of the legacy; it is accepted that the operation of the acts of the dead cannot be suspended in the same way as those of the living.

5

WHERE AN ACTION IS BROUGHT TO RECOVER A SERVITUDE OR TO CONTEST ANOTHER'S RIGHT TO ONE

1 ULPIAN, *Edict, book 14:* Actions concerning rustic or urban praedial servitudes lie to the owners of the estates concerned. Although burial grounds are not the subject of private ownership, a right of way to a tomb can certainly be claimed.

2 ULPIAN, *Edict, book 17:* In the case of servitudes, actions *in rem* lie to us on the analogy of those which relate to usufruct, that is, both the *actio confessoria* and the *actio negatoria*. The *actio confessoria* lies to a man who contends that he has a right of servitude, while the *actio negatoria* lies to an owner who denies that one exists. 1. However, this *actio confessoria in rem* lies to no one other than the owner of an estate; in fact, no one can bring an action to recover a servitude unless he is the owner of an adjacent estate to which he maintains that the benefit of the servitude attaches. 2. Neratius quite properly tells us that if the usufruct of a site situated in the middle of a tract of land is left as a legacy, an *iter* also goes with it (that is to say, a right of way across those parts of the surrounding land over which the man who granted the usufruct would establish it) to the extent necessary for the enjoyment of the usufruct. Now it should be understood that an *iter* which is afforded to a usufructuary for the purpose of the enjoyment of his usufruct is not a servitude as, in fact, a servitude cannot exist for the benefit of one who has a usufruct in the land.[1] However, if a servitude is attached to the land, the usufructuary may make use of it. 3. Pomponius states that a usufructuary can proceed by way of the interdict *de itinere*, if he has used the *iter* within the year; for there are two types of inquiry: one dealing with questions of law, as is the case in the *actio confessoria*; and the other with questions of fact, as in the aforesaid interdict. The same view is expressed by Julian in the forty-eighth book of his *Digest*. The opinion of Julian is at one with that of Labeo, who wrote that even if the testator who left the legacy of the usufruct was the person who made use of the *iter*, the usufructuary should be allowed an interdict on the grounds of equity, just as such interdicts are available to an heir or a purchaser.

3 ULPIAN, *Edict, book 70:* The same rule also applies if a man purchases part of an estate.

4 ULPIAN, *Edict, book 17:* The actual substance of a tract of land is not the property of the man who has a servitude over it; what belongs to him is a right of way across it. 1. A man who has an *iter* without an *actus* or who has an *actus* without an *iter* can bring an action for a servitude. 2. In the *actio confessoria*, which is brought for a servitude, profits are also taken into account. Let us then consider what profits there can be in connection with a servitude. As to this, the

1. Or perhaps, "for the benefit of a usufractuary alone."

better view is that only the interest, if any, which the plaintiff has in not being prevented from exercising the servitude can be reckoned as coming under the heading of profits. Again, in the *actio negatoria*, as Labeo says, profits are calculated on an assessment of the plaintiff's interest in not having his opponent exercise a right of way across his land. Pomponius approves this opinion. 3. If several persons own an estate to which the benefit of an *iter* attaches, each of the owners can bring an action for the whole, as indeed, Pomponius states in his forty-first book. However, in the calculation of profits, the interest to be taken into account is, of course, the interest of the man who brings the action. Thus, as far as the right itself is concerned, any of the owners can proceed separately and success in the action will benefit them all; but the estimation of profits will be made with reference to the interest of the man who brought the action, although, of course, a servitude cannot be acquired through one co-owner alone. 4. If a servient estate is the property of two owners, the action in question can be brought against either one of them and, as Pomponius states in the same book, whichever of them defends the case must restore the whole, because a servitude is something which does not admit of division. 5. If a man does not challenge my right of *iter*, *actus*, or *via*, but does not allow me to carry out repairs or to surface the route, Pomponius writes in the same book that I must proceed by way of the *actio confessoria*. Indeed, even if my neighbor has a tree hanging over to the extent that it makes my *via* or *iter* impassable or difficult to use, Marcellus, in an annotation on a passage in Julian, states that an action can be brought for the *iter* or to recover the *via*. As regards the repair of a *via*, we can also make use of an interdict, that is, the one available for the repair of an *iter* or an *actus*; however, this interdict is not available if a man wants to surface the road with stone, unless there was an express agreement permitting him to do so. 6. Again, an action *in rem* lies to us in respect of a right to draw water, because this right is a servitude. 7. An action in respect of a servitude also lies to the owner of a building who denies that he is subject to a servitude in favor of his neighbor, when his house is not completely unencumbered, but is not burdened with a servitude in favor of the particular individual against whom the action is brought. For example, suppose I have a house, adjacent to the Seian and Sempronian houses, and that I am bound to observe a servitude in favor of the latter. I want to institute proceedings against the owner of the Seian house because he is preventing me from raising the height of my house. I should proceed by means of an action *in rem*; although my house is burdened with a servitude, it is not subject to one in favor of the man against whom the action is brought. I can, therefore, claim that I have a right to raise the height of my house without the consent of the defendant because, as far as he is concerned, my house is unencumbered. 8. If a man is altogether prohibited from raising the height of his house, an action can quite properly be brought against him, alleging that he has no right to do so. A servitude of this kind may even exist in favor of a man who owns a house some distance away.

5 PAUL, *Edict, book 21:* So if your house stands between my house and that of Titius, I can impose a servitude on the house of Titius to prevent him from raising it in height, even although your house is not subjected to a similar servitude. The reason is that I can derive benefit from the servitude so long as you do not raise the height of your house.

6 ULPIAN, *Edict, book 17:* If it should happen that the man who owns the intervening property, seeing that he is not bound to observe a servitude, raises the height of his house with the result that if I build, I cannot now be held to obstruct your light, a claim on your part to the effect that I have no right to keep my buildings in this condition without your consent would meet with no success. However, if within the prescribed period, your neighbor takes down his building again, your right of action will revive. 1. It should be understood that as far as these servitudes are concerned, the person who is in possession of the right may also be the plaintiff. So suppose that I have not raised the height of a building on my land; my opponent is in possession of the right. As nothing new has been done, he has possession and can prevent me from building by means of a civil action or the interdict against force or stealth, just as he could stop me by the throw of a pebble. However, if I build with no objection on his part, I will become the possessor. 2. Further, with reference to a servitude imposed for the purpose of providing support, an action is available to us, to compel the servient owner to maintain the support and repair his buildings in the way provided for when the servitude was created. Gallus thinks that a servitude cannot be created to compel a man do to something, but only to stop him preventing me from doing some-

thing; in fact, in respect of every servitude, the duty of carrying out repairs is that of the man who claims the benefit of the servitude and not that of the owner of the servient property. However, the view of Servius has prevailed, so that in this particular case, a man can claim the right to compel his opponent to repair a wall, so that it can support the load. On the other hand, Labeo writes that this servitude does not burden the individual, but the property; consequently, the owner is free to abandon the property. 3. In fact, this action is *in rem* rather than *in personam* and lies to no one other than the owner of the dominant house and only against the owner of the servient house, in keeping with the statement of claim in actions for all other servitudes. 4. Suppose a dominant house is the property of a number of co-owners. Papinian, in the third book of his *Questions*, discusses whether an action can be brought for the entire servitude. He says that each of the owners can proceed individually for the whole, as is the case with other servitudes with the exception of usufruct. But, he adds, the answer would not be the same if the house which was owned in common was one which provided a neighboring proprietor with support. 5. The type of repair that can be the subject of this action depends on the type specified when the servitude was imposed; for example, it might have been agreed that the repairs were to be made with dressed stone or building stone or with any other type of material specified when the servitude was created. 6. Profits are also taken into account in this action; that is to say, the advantage which the plaintiff would have had if his neighbor had provided support for his house. 7. Certainly, the servient owner is free to improve the condition of the wall beyond that agreed on when the servitude was created, but if he causes its condition to deteriorate, he can be stopped either by means of this action or by notification of new structure.

7 PAUL, *Edict, book 21:* The outcome of such actions is this: By order of the judge a successful plaintiff will be given either specific relief or a *cautio*. In this case, "specific relief" means that the judge will order the defendant to repair the defect in the wall and render it fit for its purpose. The provision of a *cautio* means that the judge will order him to give an undertaking that the wall will be repaired and that neither he nor his successors will prevent the plaintiff building on it and keeping up what he has built. If the defendant gives such an undertaking, he will be discharged. But if he gives neither specific relief nor the *cautio*, the judge will condemn him for an amount, determined by the plaintiff's oath as sworn to in court.

8 ULPIAN, *Edict, book 17:* Although the duty of repairing the wall is thus that of the servient neighbor, the propping up of the buildings of the dominant owner, while repairs are in progress, should not be considered the responsibility of the owner of the lower building; for if the dominant owner does not want to shore up his buildings, he can take them down and rebuild them when the wall has been repaired. In this case, too, as in that of servitudes in general, an *actio contraria* will be given, that is to say, an action in which it is asserted that you do not have the right to compel me to do something. 1. An action lies to me against the man who grants me a servitude to the effect that I shall have the right to insert beams into his wall and, for example, to build a covered walk upon the beams and to place columns on the wall, which will support the roof of the walk. 2. However, these actions differ from one another in the following way: The former may be used even to compel an adjacent proprietor to repair my wall, while the latter is only available to compel him to receive my beams; and this is not out of keeping with the ordinary rules governing servitudes. 3. Suppose the question is asked, which of the parties is to be in the rôle of possessor and which is that of claimant? The answer is that if the beams have already been inserted, the party who is in the position of possessor is the one who claims the benefit of the servitude; but if the beams have not yet been inserted, then the man who denies the right is the possessor. 4. If the man who lays claim to the servitude wins his case, the servitude does not have to be granted to him; if the decision is sound, he already has it; while if it is unsound, the terms of the decree do not require the creation of a servitude, but that one be declared to be already in existence. Clearly, if the plaintiff has lost his right by nonuse after joinder of issue, owing to the malicious fraud of the owner of the building, it ought to be restored to him, just as has been decided with reference to the case of the owner of a house. 5. Aristo states in an opinion given to Cerellius Vitalis that he does not think that smoke can lawfully be discharged from a cheese shop onto the buildings above it, unless they are subject to a servitude to this effect, and this is admitted. He also holds that it is not permissible to discharge water or any other substance from the upper onto the lower property, as a man is only

permitted to carry out operations on his own premises to this extent, that he discharge nothing onto those of another; and he adds that one can discharge smoke just as well as water. Thus, the owner of the upper property can bring an action against the owner of the lower, asserting that the latter does not have the right to act in this way. Finally, he notes that Alfenus tells us that an action can be brought, alleging that a man does not have the right to hew stone on his own land in such a way that broken pieces fall on the plaintiff's ground. Hence, Aristo holds that the man who leased a cheese shop from the authorities of Minturnae, can be prevented from discharging smoke by the owner of the building above it, but that the authorities of Minturnae are liable to him on the lease. He adds that in the action against the man who is discharging the smoke, the allegation that can be made is that he had no right to do so. Thus, on the other hand, an action will lie in which the plaintiff may allege that he has a right to discharge smoke; this also has Aristo's approval. Further, the interdict for the possession of land may be employed, if a man is prevented from using his own land in the way he wishes. 6. A doubt is raised by Pomponius in the forty-first book of his *Readings*, as to whether a man can bring an action alleging that he has a right or that another has no right to create a moderate amount of smoke on his own premises, for example, smoke from a hearth. He says that the better opinion is that such an action cannot be brought, just as an action cannot be brought to maintain that one has a right to light a fire or sit or wash on one's own land. 7. The same author approves a decision to a different effect; he says that as in the case of steam from a bath, where a certain Quintilla had built an underground passage which ran into the property of Ursus Julius, it was held that a servitude to this effect could be created.

9 PAUL, *Edict, book 21:* If you build on ground across which I have an *iter*, I can bring an action, alleging that I have a right to walk and drive over it; if I prove my case, I can stop your construction work. Similarly, Julian tells us that if, as a result of building on his own land, my neighbor can no longer receive eavesdrip discharged from my roof, I can bring an action to assert my right, that is to say, the right to discharge eavesdrip onto his premises; the case is like that of the *via* already mentioned. If he has not yet built, the other party whether he has a usufruct or a *via* can bring an action to claim that he has a right to walk or drive or a right of usufruct. However, if the owner in question has already built, the man who has an *iter* or an *actus* can still bring an action to assert his right, but the usufructuary cannot do so, because he has lost the usufruct. Consequently, Julian holds that in the latter case, an action for fraud should be given. On the other hand, if my estate is subject to an *iter* in your favor, and you build across its course, I can quite properly contend that you have no right to build or to keep up what you have built, just as I could if you were to build something on vacant ground that belonged to me. 1. A man who has been in the habit of using a wider or narrower *via* than he was entitled to will retain his servitude, just as a man who, having a right to take water, uses it mixed with other water, will retain his right.

10 ULPIAN, *Edict, book 53:* If a man has obtained a right to channel water by long use and, as it were, by long possession, he is not required to lead evidence to establish the legal title on which his right to the water is founded, for example, to show that it rests on a legacy or on some other ground. He is entitled to an *actio utilis* to establish that he has had the use of the water, say, for so many years, and that this was not obtained by force, stealth, or *precarium*. 1. This action can be brought not only against the man on whose land the source of the water is situated or across whose land it is channeled, but, in fact, against anyone at all who prevents one from channeling the water, as is the case with servitudes in general. In short, by means of this action, I can proceed against anyone who tries to stop me from channeling the water.

11 MARCELLUS, *Digest, book 6:* Can one of a number of owners in common lawfully build on the common property without the permission of the others? That is to say, if he is forbidden to do so by his fellow co-owners, can he bring an action against them to allege that he has a right to build? Or can his fellow co-owners bring an action against him, to assert that they have a right to stop him or that he has no right to build? If the building has already been constructed, can they bring an action against him to contend that he has no right to have a

building thus sited? The better opinion may be said to be that a co-owner has a right to prevent building rather than to build. The reason is that generally a man who attempts to build in the way described, if he proposes to use the common property as he pleases, as if he were its sole owner, is more or less appropriating for himself a right which belongs to others as well.

12 JAVOLENUS, *Letters, book 2:* I have brought an action, alleging that my opponent does not have the right to insert beams into my wall. Will he also have to give an undertaking that he will not do so in the future? My opinion is that I consider it is the duty of the judge to ensure that an undertaking is given in respect of future operations as well.

13 PROCULUS, *Letters, book 5:* I have pipes, through which I conduct water, positioned along a public roadway; these rupture and your wall is flooded. My opinion is that you have a good right of action against me to contend that I have no right to allow water to flow from my premises on to your wall.

14 POMPONIUS, *Sabinus, book 33:* Suppose a wall is my own property and I allow you to insert into it beams which you have had there for some time. If you propose to make any further insertions, I can stop you; indeed, I have a right of action against you to have you remove any additional beams that you have inserted. 1. If a wall which you and I own in common should lean toward my house as the result of some activity on your part, I can bring an action against you to allege that you have no right to keep the wall in that condition.

15 ULPIAN, *Opinions, book 6:* By raising the height of his house, a man caused it to obstruct the light from the house of a *minor* below the age of twenty-five, or of an *impubes*, whose curator or tutor he was. Although, in this case, the man in question and his heirs will be liable to an action, because he should not have committed an act which, by virtue of his position, he was required to stop anyone else from doing, still, an action should also be allowed to the *impubes* or *minor* against the person in possession of the offending house, to obtain the demolition of what had been unlawfully constructed.

16 JULIAN, *Digest, book 7:* Suppose I purchase from you permission to discharge eavesdrip from my house onto yours; subsequently, with your knowledge and acting on the purchase, I make the discharge. Basing a claim on these grounds, can I protect myself by means of an action or a defense? My answer was that I can resort to either means of protection.

17 ALFENUS, *Digest, book 2:* Suppose there is a wall between two houses, which so protrudes that it leans over half a foot or more toward the adjacent property. The proper course is to bring an action, to contend that the defendant had no right to allow the wall to project thus over the premises of the plaintiff without his consent. 1. A certain part of the premises of Gaius Seius was subject to a servitude in favor of the house of Annius to the effect that Seius should not have the right to place anything on that particular spot. Seius planted trees there beneath which he placed basins, bowls, and vessels. All those learned in the law advised Annius to bring an action against Seius, to contend that the latter had no right to keep such articles on that ground without his permission. 2. A man, whose neighbor had thrown up a dung heap against his wall, with the result that the wall became damp, sought advice as to how he could compel his neighbor to remove the heap. My answer was as follows. If the neighbor had thrown up the heap on public ground, he could be compelled to remove it by means of an interdict, but if he had done so on private ground, it would be necessary to bring an action, raising the question of a servitude. If a stipulation had been given in respect of threatened damage, then the aggrieved party could protect himself by means of this stipulation, if he had suffered any loss as a result of the circumstances described.

18 JULIAN, *From Minicius, book 6:* A man, whose slaves prevented his neighbor from channeling water, kept out of the way to avoid proceedings being taken against him. The aggrieved party asked what course of action he should take. My answer was that the praetor, on cause shown, ought to order the goods of the other party to be taken into possession and not restored until he had created a right to channel water in favor of the complainant and made good any loss he had suffered through drought as a result of being prevented from channeling water, for example, if his pastures or trees had shriveled up.

19 MARCIAN, *Rules, book 5:* If a man brings an action concerning a servitude which he has in common with others and frames his claim in the correct way, but somehow loses the case through his own fault, it is not equitable that this should prejudice the others. However, if he colludes with his opponent and abandons the case, Celsus holds that the others must be allowed an action for fraud; this, he says, was also the opinion of Sabinus.

20 SCAEVOLA, *Digest, book 4:* A testatrix left an estate as a legacy; adjacent to the estate were some cottages which she owned. If the cottages were not included in the legacy of the estate and the legatee brought an action to recover it, would the said estate be subject to any servitude in favor of the cottages? Or if the legatee claimed that the estate should be conveyed to him under the terms of a *fideicommissum*, ought the heirs to reserve a servitude in favor of the cottages? The answer given was in the affirmative. 1. Several citizens of a municipality, who held different estates respectively, purchased a tract of woodland as their common property so as to have a common right of pasture; this arrangement was kept up by their successors. However, some of those who had this right of pasture subsequently sold the aforesaid estates which they respectively owned. Does the right referred to also pass with the estates as a result of sale, since it was the intention of the sellers to transfer this right as well? The answer given was that the agreement made between the parties to the contract must be observed; but if the intention of the parties was not clear, the right in question would go to the purchasers. Further, if part of one of the above-mentioned estates passes to someone as the result of a legacy, does it carry with it a share in the common right of pasture? The answer given was that as the right must be held to attach to the estate which is the subject of the legacy, it too would go to the legatee.

21 LABEO, *Plausible Views Epitomized by Paul, book 1:* If water has not yet appeared, a right of access to it or a right to channel it cannot be created. PAUL: On the contrary, I think that this is a mistaken view for the reason that a grant can be made, allowing one to search for water and to channel it when found.

6

HOW SERVITUDES ARE LOST

1 GAIUS, *Provincial Edict, book 7:* Praedial servitudes are extinguished by merger if the same person becomes owner of both estates.

2 PAUL, *Edict, book 21:* If a man who has both an *iter* and an *actus* only exercises the former of these rights during the prescribed period, then, as Sabinus, Cassius, and Octavenus hold, his *actus* is not lost, but remains valid. A man who has a right of *actus* may also exercise one of *iter* as a matter of course.

3 GAIUS, *Provincial Edict, book 7:* It is generally held that rights attached to land are not lost by death or by a change of civil status.

4 PAUL, *Edict, book 27:* An *iter* to a tomb is never lost by nonuse.

5 PAUL, *Edict, book 6:* A servitude can be kept up on our behalf through a co-owner, a usufructuary, or a possessor in good faith.

6 CELSUS, *Digest, book 5:* It is sufficient that a right of *iter* has been exercised, as attaching to the land. 1. Suppose I make use of a *via* which you and I have across a neighbor's estate, but that you do not do so for the prescribed period; will you lose your right? Or, alternatively, suppose that a neighbor, who has a *via* across our estate, walks and drives over my part of the land, but does not enter your part; will this release your part from the servitude? Celsus answered as follows. If the estate is divided between the co-owners into separate portions, then, as far as the servitude which exists in favor of the estate is concerned, it is as if it had been attached to two separate estates from the outset. So, each of the owners may exercise the servitude as his own, and each of them will lose it, as far as he is concerned, by nonuse; in this matter, the legal positions of the two portions are no longer bound up with one an-

other. Nor is this construction in any way detrimental to the interests of the owner of the servient estate; indeed, if anything, he is better off because exercise of the right by one or other of the owners benefits that owner alone, not the estate as a whole. 1a. If, on the other hand, it is the servient estate which is thus divided up, the matter involves a little more uncertainty. If the course of the *via* is settled and specifically defined, then if the boundary between the two portions of land is in line with it, the rules to be observed are in every respect the same as they would have been if, when the servitude was originally created, there had similarly been two separate estates. However, if the estate is divided by a line which crosses the *via* (and it makes little difference whether it was divided into equal or unequal portions), then the right of servitude remains exactly as it was before the division was made; nor can anything less than the whole *via* be retained by use or lost by nonuse. Further, if it should happen that only that part of the route which crosses one of the two estates is used, it does not follow that the other estate will acquire freedom from the servitude. The reason is that a *via* is one single unit and therefore indivisible. 1b. At the same time, it is open to the parties to release either of the estates from the servitude, provided that they specifically agree to do so. At least, if the owner of the dominant estate purchases one of the estates which resulted from the division, can it be said that the servitude over the other estate still remains in force? It does not seem to me that any preposterous results will follow from this opinion, so long as one of the estates remains subject to the servitude, provided that at the outset, a narrower *via* could have been created than was defined in the agreement and that on the estate which was not released from the servitude, there still remains sufficient space for the exercise of the *via*. However, if insufficient space remains to allow this to be done, both the estates will be released from the servitude: the one as a consequence of the purchase and the other because the creation of a *via* over the ground which remained would be impossible. 1c. Suppose, however, that the *via* was so constituted that the beneficiary was to be entitled to walk or drive over any part of the estate he pleased and that there was nothing to prevent him from changing the course of his route from time to time and that the estate was afterward divided up. If he could thus both walk and drive over any part of the estate he chose, then we shall have to treat the matter just as if, at the outset, two separate servitudes had been created over the two estates respectively, with the result that one could be retained and the other lost by nonuse. 1d. I am not overlooking the fact that in this case, the right of one man would be prejudiced by the act of another, because, before the division of the estate, it sufficed that the party entitled walked or drove over one part of the estate for him to retain the same right over the rest of it. On the other hand, the man entitled to the *via* gained the advantage of being able to walk or drive along two roads equally, that is, along two roads eight feet wide where straight and sixteen feet wide on bends.

7 PAUL, *Plautius, book 13:* Suppose a right to channel water is created on the terms that it may only be exercised during the summer or in one particular month. How can the right be lost by nonuse, since one cannot point to an unbroken period of time when the beneficiary could have used it, but did not? Accordingly, if a man has a right to take water during alternate years or alternate months, the right is lost by the lapse of twice the prescribed period. The same rule applies in the case of a right of way. However, if the right may be exercised on alternate days or only during the day or only at night, it will be lost by the lapse of the period established by law, because, in this case, the exercise of the servitude is considered continuous; as Servius tells us, if a man has a servitude which he may exercise every other hour or for one hour during the day, he will lose the servitude by not using it, because he has a right which can be exercised every day.

8 PAUL, *Plautius, book 15:* If I have the right to discharge eavesdrip on to vacant ground of yours and I give you leave to build on that ground, I lose my aforesaid right. Similarly, if I have a *via* across your land and I allow you to construct something on the ground across which the roadway runs, I lose my right. 1. A man who goes along

part of an *iter* is held to use the whole right of way.

9 JAVOLENUS, *Plautius, book 3:* If water flows into part of a watercourse, then, even although it does not reach its farthest end, every part of the course is still considered to be in use.

10 PAUL, *Plautius, book 15:* Suppose a *pupillus* and I are co-owners of an estate; although neither of us makes use of a *via* attached to it, nevertheless, I retain the *via* on account of the interests of the *pupillus*. 1. If a man who has a right to draw water at night only does so during the day for the period prescribed for the loss of a servitude by nonuse, he loses his servitude of drawing water at night through his failure to exercise it. The rule is the same in the case of a man who has a right to use a watercourse during particular hours and who makes use of it at other times and not during any part of the hours specified.

11 MARCELLUS, *Digest, book 4:* A man who was entitled to a *via* or an *actus* on the terms that he should only use vehicles of a particular type, used one of another type. Let us consider whether he has not lost his servitude and whether the position is any different in the case of a man who has been conveying a heavier load than he was entitled to convey; the latter may be held to have acted in excess of his right rather than to have done anything else, just as if he had made use of a broader roadway than he ought or driven a greater number of beasts of burden along it than he should have done or mixed water which he had a right to take with that from another source. Accordingly, in all the instances cited, the servitude is not lost; but the party entitled to it is not to be allowed to have a right more extensive than that agreed to when the servitude was created. 1. Land was left as a legacy subject to a condition, and the heir subjected it to certain servitudes. If the condition is fulfilled, the servitudes will be extinguished. If the servitudes had been created in favor of the land that was the subject of the legacy, let us consider whether they would go to the legatee. The better opinion is that they would.

12 CELSUS, *Digest, book 23:* A man purchased in good faith an estate which did not belong to the seller and made use of an *iter* attaching to it. The *iter* in question is kept up, and this would also be the case, even if he was in possession of the land by way of *precarium* or after the owner had been forcibly ejected. The fact is that when an estate has particular attributes attaching to it and is possessed in that condition, such a right is not lost; and it makes little difference whether the possession of the man, who possesses it as such, is lawful or not. For this reason, it can be stated with even more conviction that if water flows through a watercourse of its own volition, the right to channel water along it is retained. This opinion was quite rightly approved by Sabinus, as Neratius tells us in the fourth book of his *Parchments*.

13 MARCELLUS, *Digest, book 17:* Suppose that a man, who had an estate to which was attached a *via* across a neighbor's land, sold a part of that estate which adjoined the servient property without subjecting it to the servitude; suppose further that he reacquired the ground he had sold before the prescribed period, the passage of which results in the loss of a servitude, had elapsed. He will retain the servitude to which his neighbor was subject.

14 JAVOLENUS, *From Cassius, book 10:* If ground, which is burdened with an *iter*, *actus*, or *via*, is flooded by a river but, before the period of time required for the loss of a servitude has elapsed, it is restored to its former condition by alluvial deposits, the servitude is also revived, to exist as it did formerly. However, if the prescribed period has elapsed with the result that the servitude has been lost, the owner of the ground can be compelled to renew it. 1. When a public roadway is destroyed by a river flooding or by some other disaster, it is the duty of the landowner, whose land is closest to it, to provide a means of passage.

15 JAVOLENUS, *Letters, book 2:* If I am entitled to a servitude over a number of estates and I acquire one of these estates which lies between two others, my opinion is that the servitude is kept up. The reason is that a servitude is only lost when the man to whom it belongs can no longer make use of it; but despite the acquisition of an estate which lies between two others, it may be the case that an *iter* still exists over the estates that come first and last.

16 PROCULUS, *Letters, book 1:* A number of men were accustomed, as of right, to channel water, which had its source on a neighbor's estate, along the same watercourse. The arrangement was that each man, on his appointed day, channeled the water from its source,

first of all along the aforesaid watercourse, which they used in common, and then, according to the distance of his land from the head of the course, along a channel of his own. One of the men failed to channel any water throughout the prescribed period, the lapse of which results in the loss of a servitude. My opinion is that he has lost his right to channel water and that his right was not exercised by the others who did channel it. The fact is that the right belonged to each one of them as his own individual property and could not be exercised through another of them. However, if the right to the watercourse had been attached to an estate owned by several men, it could have been exercised by one on behalf of all the others, who had a share in the ownership of the estate. Similarly, if one of the men who were entitled to the servitude of channeling water and who were in the habit of channeling it along the same watercourse should lose his right to do so through nonuse, no right would accrue, for that reason, to the others who were using the channel; the benefit would go to the landowner across whose land lay the watercourse the right to which, as to the share of one party, had been lost by nonuse, and the landowner would enjoy freedom from this much of the servitude.

17 POMPONIUS, *Readings, book 11:* Labeo holds that if a man who has a right to draw water goes to the spring but does not draw water for the period prescribed for the loss of a servitude by lapse of time, he will lose his *iter* too.

18 PAUL, *Sabinus, book 15:* If a man makes use of water other than that which it was agreed he was to use when the servitude was created, the servitude is lost. 1. The period of time during which the previous owner of an estate did not make use of a servitude attaching to it will be counted against his successor in title. 2. If you have the right to insert a beam but the prescribed period elapses without the owner of the adjacent property having a building on it with the result that you are unable to exercise your right, you do not thereby any the more lose your servitude. The reason is that the adjacent proprietor cannot be held to have acquired freedom from the servitude affecting his house by lapse of time, as he has not actually interrupted your exercise of the right.

19 POMPONIUS, *Sabinus, book 32:* Suppose I sell part of my estate and make it a term of the contract that I am to have the right to channel water across that part to the rest of my estate, and suppose that the prescribed period elapses without my constructing a watercourse. I do not lose any right, as there is no channel for the water to flow through; in fact, my right remains unimpaired. However, if I had made a watercourse and not used it, I would lose my right. 1. Suppose that I leave to you by way of legacy a *via* across my estate and that, after the acceptance of my inheritance, you remain unaware of the legacy to you for the whole of the period of time prescribed for the loss of a servitude. In this case, you lose your *via* through nonuse. But suppose that within the aforesaid period of time, before you learn of the legacy of the servitude to you, you sell your estate. In this case, the *via* will go to the purchaser, if he makes use of it during the remainder of the prescribed period, because it is clear that the right had begun to be yours. One result of this is that you would not now be entitled to repudiate the legacy, as the estate would not be your property.

20 SCAEVOLA, *Rules, book 1:* A servitude is retained by use when it is exercised by the person who is entitled to it or who is in possession of it or by his hired servant or his guest or his doctor or someone who comes to visit the owner or his agricultural tenant or a usufructuary,

21 PAUL, *Views, book 5:* even although the usufructuary should exercise it in his own name.

22 SCAEVOLA, *Rules, book 1:* In short, no matter who makes use of a *via* as if he were entitled to it,

23 PAUL, *Views, book 5:* (whether he makes use of it for the purpose of access to our estate or egress from it)

24 SCAEVOLA, *Rules, book 1:* even although he is a possessor in bad faith, the servitude is kept up.

25 PAUL, *Views, book 5:* A man is not considered to be making use of a servitude unless he believes that he is exercising a right which belongs to him. Consequently, if a man makes use of a servitude as if he were using a public roadway or a servitude belonging to someone else, he is not entitled to any interdict or action.

BOOK NINE

1

IF A FOUR-FOOTED ANIMAL IS ALLEGED TO HAVE COMMITTED *PAUPERIES*

1 ULPIAN, *Edict, book 18:* In cases where a four-footed animal is alleged to have committed *pauperies*, a right of action is derived from the *Twelve Tables*, which statute provides that that which has caused the offense (that is, the animal which caused harm) should be handed over or that pecuniary damages should be offered for the amount of the harm done. 1. The harm constitutes the delict itself. 2. This action applies to all four-footed animals. 3. The praetor says: "have committed *pauperies*." *Pauperies* is damage done without any legal wrong on the part of the doer, and, of course, an animal is incapable of committing a legal wrong because it is devoid of reasoning. 4. Therefore, as Servius writes, this action lies when a four-footed animal does harm because its wild nature has been excited, for example, when a horse given to kicking actually kicks someone or an ox likely to gore tosses someone or mules cause damage on account of some unusual vice. On the other hand, if an animal should upset its load onto someone because of the roughness of the ground or a mule driver's negligence or because it was overloaded, this action will not lie and proceedings should be brought for wrongful damage. 5. Take the case of a dog which, while being taken out on a lead by someone, breaks loose on account of its wildness and does some harm to someone else: If it could have been better restrained by someone else or if it should never have been taken to that particular place, this action will not lie and the person who had the dog on the lead will be liable. 6. Nor will this action lie if the animal did harm because someone provoked it. 7. The general rule is that this action lies whenever an animal commits *pauperies* when moved by some wildness contrary to the nature of its kind. Therefore, if a horse kicks out because it is upset by pain, this action will not lie, but he who hit or wounded the horse will be liable to an *actio in factum* under the *lex Aquilia* because and to the extent that he did not do the damage with his own body. But if the horse kicked someone who was stroking it or someone who was patting it, this action will be available. 8. And if one animal provokes another into doing damage, action must be brought on account of the one which did the provoking. 9. The *pauperies* action lies regardless of whether the animal commits *pauperies* by means of its own body or by means of some other thing with which it came into contact—as, for example, if an ox crushes someone with a cart or overturns something on him. 10. But it does not lie in the case of beasts which are wild by nature: therefore, if a bear breaks loose and so causes harm, its former owner cannot be sued because he ceased to be owner as soon as the wild animal escaped. Accordingly, if I kill the bear, the corpse is mine. 11. When two rams or two bulls fight and one kills the other, Quintus Mucius draws the distinction that if it was the aggressor which is killed, no action lies, but if it is the one which did not start the fight, the action is available, on

which account the owner of the other beast must either pay for the mischief or surrender his animal noxally. 12. And since the rule that liability for damage attaches to the physical corpus which caused the damage even in the case of animals, this action lies not against the owner of the beast at the time the damage was caused, but against whoever owns it when action is brought. 13. Clearly, therefore, if the animal dies before joinder of issue, the right of action dies with it. 14. For noxal surrender is the handing over of the live animal. Moreover, if the animal is jointly owned by several people, each is liable in full to a noxal action, just as in the case of a jointly owned slave. 15. Sometimes, however, the action against the owner will not be for noxal surrender but for the full amount of the damage, for example, if on being asked before the magistrate if the animal is his, he replies that it is not; for if it is later established otherwise, he will be condemned to pay the whole amount. 16. If the animal is killed by a third party after joinder of issue, the judge will take the *lex Aquilia* into account because an action under that law is available for the owner and because he has lost the ability to make a noxal surrender. Therefore, in the earlier action he will have to pay the damages as assessed unless he is prepared to assign his right of action against the person who killed the animal. 17. No one doubts that the *pauperies* action is available to an heir and to all kinds of successors. Moreover, it is also available against heirs and other successors, not by right of succession, but because of their legal position as owners.

2 PAUL, *Edict, book 22:* This action is available not only to an owner but to anyone who has an interest, for example, a person to whom the damaged property was lent or to a cleaner, because they are likely to be held liable on their own account. 1. If someone is fleeing from somebody, perhaps from a magistrate and rushes into the nearest shop and is there injured by a ferocious dog, some authorities maintain that action cannot be brought in respect of the dog, though they think otherwise if the dog were at large.

3 GAIUS, *Provincial Edict, book 7:* There is now no doubt that under this law an action can be brought even in the name of free persons, if, for example, an animal wounds a head of a household or a son-in-power, but that is not to say that disfigurement can be taken into account, because the body of a free person is not susceptible of valuation. Nevertheless, account can be taken of the expenses of medical treatment and the loss of employment and of the opportunity of taking a job which were caused by the party being disabled.

4 PAUL, *Edict, book 22:* The action is available as an *actio utilis* if it is not a four-footed animal, but some other kind, which committed *pauperies*.

5 ALFENUS, *Digest, book 2:* When a groom was leading a horse into the yard of an inn, it sniffed at a mule. The mule kicked out and broke the groom's leg. An opinion was sought as to whether the owner of the mule could be sued on the ground that his mule had committed *pauperies*. I answered: "Yes."

2

THE *LEX AQUILIA*

1 ULPIAN, *Edict, book 18:* The *lex Aquilia* took away the force of all earlier laws which dealt with unlawful damage, the *Twelve Tables* and others alike, and it is no longer necessary to refer to them. The *lex Aquilia* is a plebiscite, the enactment of which by the plebs was procured by the tribune Aquilius.

2 GAIUS, *Provincial Edict, book 7:* The first chapter of the *lex Aquilia* provides as follows: "If anyone kills unlawfully a slave or female slave belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the preceding year." 1. And next it is

provided that the action should be for double the value if the defendant denied his liability. 2. It thus appears that the statute treats equally our slaves and our four-footed cattle which are kept in herds, such as sheep, goats, horses, mules, and asses. But it has been questioned whether pigs should be included among cattle, and Labeo rightly holds that they are. A dog, however, does not fall within this class, and it is much more apparent that wild beasts such as bears, lions, and panthers are not cattle either. But elephants and camels are, as it were, "mixed," (for they serve as draft animals, but they are by nature wild) and accordingly should be within the scope of the first chapter.

3 ULPIAN, *Edict, book 18:* If a slave or female slave is wrongfully killed, the *lex Aquilia* applies; but it is rightly added that the killing must be unlawful; for killing alone is not enough; it must have been done unlawfully.

4 GAIUS, *Provincial Edict, book 7:* Accordingly, if I kill your slave who is lying in ambush to rob me, I shall go free; for natural reason permits a person to defend himself against danger. 1. The law of the *Twelve Tables* permits one to kill a thief caught in the night, provided one gives evidence of the fact by shouting aloud, but someone may only kill a person caught in such circumstances at any other time if he defends himself with a weapon, though only if he provides evidence by shouting.

5 ULPIAN, *Edict, book 18:* If someone kills anyone else who is trying to go for him with a sword, he will not be deemed to have killed unlawfully; and if for fear of death someone kills a thief, there is no doubt that he will not be liable under the *lex Aquilia.* But if, although he could have arrested him, he preferred to kill him, the better opinion is that he should be deemed to have acted unlawfully (*injuria*), and therefore he will also be liable under the *lex Cornelia.* 1. We must here, of course, not take *injuria* as meaning some sort of insult, as it indicates in the action for insult, but as indicating something done illegally, that is, contrary to the law—as, for example, if one kills wrongfully. Thus, although from time to time the action under the *lex Aquilia* and the action for insult concur, there will in such a case be two assessed heads of damages, one for wrongful harm and one for insult. Therefore, we interpret *iniuria* for present purposes as including damage caused in a blameworthy fashion, even by one who did not intend the harm. 2. And accordingly, the question is asked whether there is an action under the *lex Aquilia* if a lunatic causes damage. Pegasus says there is not; for he asks how there can be any accountable fault in him who is out of his mind; and he is undoubtedly right. Therefore, the Aquilian action will fail in such a case, just as it fails if an animal has caused damage or if a tile has fallen; and the same must be said if an infant has caused damage, though Labeo says that if the child were over seven years of age, he could be liable under the *lex Aquilia* in just the same way as he could be liable for theft. I think this is correct, provided the child were able to distinguish between right and wrong. 3. If a teacher kills or wounds a slave during a lesson, is he liable under the *lex Aquilia* for having done unlawful damage? Julian writes that a man who had put out a pupil's eye in the course of instruction was held liable under the *lex Aquilia.* There is all the more reason therefore for saying the same if he kills him. Julian also puts this case: A shoemaker, he says, struck with a last at the neck of a boy (a freeborn youngster) who was learning under him, because he had done badly what he had been teaching him with the result that the boy's eye was knocked out. On such facts, says Julian, the action for insult does not lie because he struck him not with intent to insult, but in order to correct and teach him; he wonders whether there is an

action for breach of the contract for his services as a teacher, since a teacher only has the right to administer reasonable chastisement, but I have no doubt that action can be brought against him under the *lex Aquilia*,

6 PAUL, *Edict, book 22:* for excessive brutality on the part of a teacher is blameworthy.

7 ULPIAN, *Edict, book 18:* And in this action the father will recover the amount of his loss of prospective profit from his son's services, of which he is deprived through the eye being damaged, and also the expenses incurred for medical attention. 1. Now we must accept "killing" to include the cases where the assailant hit his victim with a sword or a stick or other weapon or did him to death with his hands (if, for example, he strangled him) or kicked him with his foot or butted him or any other such ways. 2. But if one who is unreasonably overloaded throws down his burden and kills a slave, the Aquilian action lies; for it was within his own judgment not to load himself thus. For even if someone slips and crushes another man's slave with his load, Pegasus maintains that he is liable under the *lex Aquilia* provided he overloaded himself unreasonably, or negligently walked through a slippery place. 3. Thus, if someone does damage through being pushed by somebody else, Proculus writes that neither is liable under the *lex*; the one who pushed is not liable because he did not kill, nor is the one who was pushed because he did not do the damage unlawfully. According to this view, an *actio in factum* will be given against the one who pushed. 4. If a man kills another in the *colluctatio* or in the *pancratium* or in a boxing match (provided the one kills the other in a public bout), the *lex Aquilia* does not apply because the damage is seen to have been done in the cause of glory and valor and not for the sake of inflicting unlawful harm; but this does not apply in the case of a slave, because the custom is that only freeborn people compete in this way. It does, however, apply where a son-in-power is hurt. Clearly, if someone wounds a contestant who has thrown in the towel the *lex Aquilia* will apply, as it will also if he kills a slave who is not in the contest, except if he has been entered for a fight by his master; then the action fails. 5. But if someone gives a light blow to a sickly slave and he dies from it, Labeo rightly says that he is liable under the *lex Aquilia*; for different things are lethal for different people. 6. Celsus says it matters a great deal whether one kills directly or brings about a cause of death, because he who furnishes an indirect cause of death is not liable to an Aquilian action, but to an *actio in factum*, wherefore he refers to a man who administered poison instead of medicine and says that he thereby brought about a cause of death in the same way as one who holds out a sword to a madman; and such a man is not liable under the *lex Aquilia* but to an *actio in factum*. 7. But if a man throws another off a bridge Celsus says that regardless of whether he is killed by the impact or merely drowns at once or whether he perishes from exhaustion because he is overcome by the force of the current, there is liability under the *lex Aquilia*, just as if one dashes a child against a rock. 8. Proculus says that if a doctor operates negligently on a slave, an action will lie either on the contract for his services or under the *lex Aquilia*.

8 GAIUS, *Provincial Edict, book 7:* And the law is just the same if one misuses a drug, or if, having operated efficiently, the aftercare is neglected; the wrongdoer will not go free, but is deemed to be guilty of negligence. 1. Furthermore, if a mule driver cannot control his mules because he is inexperienced and as a result they run down somebody's slave, he is generally said to be liable on grounds of negligence. It is the same if it is because of weakness that he cannot hold back his mules—and it does not seem unreasonable that weakness should be deemed negligence; for no one should undertake a task in which he knows or ought to know that his weakness may be a danger to others. The legal position is just the same for a person who through inexperience or weakness cannot control a horse he is riding.

9 ULPIAN, *Edict, book 18:* Labeo makes this distinction if a midwife gives a drug from

which the woman dies: If she administers it with her own hands it would appear that she killed; but if she gave it to the woman for her to take it herself an *actio in factum* must be granted. This opinion is correct; for she provided a cause of death rather than killed. 1. If someone administers a drug to anyone by force or persuasion, either in a drink or by injection, or rubs him with a poisonous potion, he is liable under the *lex Aquilia*. 2. Neratius says that if a man starves a slave to death he is liable to an *actio in factum*. 3. If when my slave is out riding you scare his horse so that he is thrown into a river and dies as a result, Ofilius writes that an *actio in factum* must be given in just the same way as when my slave is lured into an ambush by one man and killed by another. 4. But if a slave is killed by people throwing javelins by way of sport, the Aquilian action lies. On the other hand, if when other people were already throwing javelins in a field a slave walked across the same field, the Aquilian action fails, because he should not make his way at an inopportune time across a field where javelin throwing is being practiced. However, anyone who deliberately aims at him is liable under the *lex Aquilia*.

10 PAUL, *Edict, book 22:* For playing dangerous games is blameworthy conduct.

11 ULPIAN, *Edict, book 18:* Further, Mela writes that, when some people were playing with a ball, one of them hit it hard and it knocked the hands of a barber with the result that the throat of a slave whom the barber was shaving was cut by the jerking of the razor. In which of the parties does the fault lie? For it is he who is liable under the *lex Aquilia*. Proculus says the blame is the barber's, and surely, if he was doing shaving in a place where people customarily played games or where there was much going to and fro, the blame will be imputed to him; but it is no bad point in reply that if someone entrusts himself to a barber who has his chair in a dangerous place he has only himself to blame for his own misfortune. 1. If one man holds a slave while another kills him, he who did the holding will be liable to an *actio in factum* because he furnished a cause of death. 2. But if several people do a slave to death, let us see whether they are all liable as for killing. If it is clear from whose blow he perished, that person is liable for killing; but if it is not clear, Julian says that all the assailants are liable as if they had all killed; and if the action is brought against only one of them, the others are not released from liability; for under the *lex Aquilia* what one pays does not lessen what is due from another, as it is a penal law. 3. Celsus writes that if one attacker inflicts a mortal wound on a slave and another person later finishes him off, he who struck the earlier blow will not be liable for a killing, but for wounding, because he actually perished as the result of another wound. The later assailant will be held liable because he did the killing. It seems thus to Marcellus and it is the more likely. 4. If several people throw down a beam and thereby crush a slave, it seemed right to the ancient jurists that they should all be liable under the *lex Aquilia*. 5. Again, Proculus gave an opinion that the Aquilian action lies against him who, though he was not in charge of a dog, annoyed it and thus caused it it to bite someone; but Julian says the *lex Aquilia* only applies to this extent that it applies to him who had the dog on a lead and caused it to bite someone; otherwise, if he were not holding it, an *actio in factum* must be brought. 6. The action on the *lex Aquilia* is available to the *erus*, that is, the owner. 7. If wrongful damage is done to a slave whom I am returning to you because he has some serious defect which rescinds the contract for his sale to me, Julian says an action under the *lex Aquilia* has accrued to me, but that I must cede it to you when I begin the restoration of the slave to you. 8. But if a slave is in the service of one who is not his owner, but who wrongly though in good faith believes that he is, is the Aquilian action available to him? It seems rather that an *actio in factum* will be given. 9. Julian says that a person to whom clothes have been lent cannot proceed under the *lex Aquilia* if they are torn, but that the action is available to the owner. 10. Julian also discusses whether those granted the use and enjoyment of the produce of another's property have the action; but I think that in such circumstances it is rather the *actio utilis* that should be given.

12 PAUL, *Sabinus, book 10:* But if the true owner wounds or kills a slave in whom I have a usufruct, I should be given an action against him on the analogy of the *lex Aquilia,* according to the value of my usufruct, so that even the part of the year before my usufruct was created should be brought into account in making the valuation.

13 ULPIAN, *Edict, book 18:* For an injury to himself a freeman has on his own account an *actio utilis* after the manner of the Aquilian action. He cannot have the direct action under the *lex* because no one is deemed to be the owner of his own limbs. The owner has a direct action on account of a runaway slave. 1. Julian writes that if a freeman acts in the honest belief that he is my slave, he is liable to me under the *lex Aquilia* for any damage he does. 2. If a slave who is part of an unclaimed inheritance is killed, it is debated who can bring the Aquilian action, since no one is the owner of such a slave. Celsus says that the law meant any loss to be made good to the owner and that the inheritance is therefore deemed to be the owner. Accordingly, the heir may sue when he has entered into his inheritance. 3. If a slave left as a legacy is killed after the heir's entry into the inheritance, the legatee is competent to bring the action under the *lex Aquilia* if he did not acknowledge his legacy after the slave's death; but if he refused his legacy, Julian says the consequence is that the action is available to the heir.

14 PAUL, *Edict, book 22:* But if the heir himself kills the slave, it is said that an action must be given to the legatee against him.

15 ULPIAN, *Edict, book 18:* From the opinion of Julian it follows that if a slave left as a legacy is killed before the heir enters upon his inheritance, the Aquilian action which has been acquired by the inheritance remains for the heir. But if the slave should be wounded before the entry of the heir, the action still remains in the inheritance, but it should be assigned to the legatee. 1. If a slave who has been mortally wounded has his death accelerated subsequently by the collapse of a house or by shipwreck or by some other sort of blow, no action can be brought for killing, but only as if he were wounded; but if he dies from a wound after he has been freed or alienated, Julian says an action can be brought for killing. These situations are so different for this reason: because the truth is that in the latter case he was killed by you when you were wounding him, which only became apparent later by his death; but in the former case the collapse of the house did not allow it to emerge whether or not he was killed.

But if you order that a mortally wounded slave shall be freed and be your heir and then he dies, his heir cannot sue on the *lex Aquilia,*

16 MARCIAN, *Rules, book 4:* because in this case matters had reached a point where an action cannot arise.

17 ULPIAN, *Edict, book 18:* If a master kills his own slave, he will be liable to a *bona fide* possessor or one who had accepted him as a pledge in an *actio in factum.*

18 PAUL, *Sabinus, book 10:* But if he who has accepted the slave as a pledge kills or wounds him, a right of action can arise under both the *lex Aquilia* and the contract of pledge, though the plaintiff will have to be content with one or the other.

19 ULPIAN, *Edict, book 18:* However, if someone kills a slave owned jointly with another, the *lex Aquilia* applies to him; and it is the same if he wounded him,

20 ULPIAN, *Sabinus, book 42:* of course, in proportion to the plaintiff's share of ownership.

21 ULPIAN, *Edict, book 18:* The *lex Aquilia* refers to "whatever was the highest value of the slave during the year." This clause contains the mode of valuation of the damage that has been done. 1. Now the year is reckoned backward from the time when the slave was killed; but if he was mortally wounded and later died after a long interval, we shall reckon the year, according to Julian, from the time he was wounded,

though Celsus writes to the contrary. 2. But are we valuing only his body, how much it was worth when he was killed, or rather how much it was worth to us that he should not be killed? We use this rule, that the valuation should be what he was worth to the plaintiff.

22 PAUL, *Edict, book 22:* Thus, if you have killed a slave whom I have promised to hand over under a penalty, my benefit comes into account in the judgment. 1. Furthermore, other heads of damage necessarily connected are taken into account, if, for example, someone kills one of a troupe of actors or musicians or one of twins or of a chariot team or one of a (matched) pair of mules; for not only must a valuation be made of the object destroyed but it must also be borne in mind how much the value of the others has been lessened.

23 ULPIAN, *Edict, book 18:* Therefore, Neratius writes that if a slave who has been instituted as heir is killed, the value of the inheritance comes into the reckoning. 1. Julian says that if a slave is killed when it has been ordered that he should go free and become an heir, neither the substitute nor the statutory heir will secure by an action under the *lex Aquilia* the value of the inheritance, which was not yet due to the slave himself; and this view is correct. Therefore, he says that there should be an assessment only of the slave's market value, because this appears to be the only interest of the substitute. On the other hand, I think that not even the slave's market value should be the measure of damages, because if the slave had become heir, he would also have become free. 2. The same Julian writes further that if I should be instituted heir on the condition of freeing the slave Stichus and Stichus is killed after the testator's death, I can sue for the value of the inheritance in the assessment of my damages; for the condition failed because of the killing. But if he is killed in the testator's lifetime, the valuation of the inheritance is not made, because the highest valuation is calculated retrospectively. 3. Julian also writes that the valuation of the dead slave is made as at that time in the preceding year when he was worth most; and accordingly, if the thumb of a most valuable painter had been cut off beforehand and within a year of its loss he is killed, the Aquilian action lies and he must be valued at his price before he lost his skill together with his thumb. 4. On the other hand, in the case of killing a slave who had committed great embezzlements in running my affairs and whom I had resolved to examine by torture in order to drag out the names of his accomplices in dishonesty, Labeo writes very rightly that he must be valued according to my interest in detecting the frauds he had committed and not according to the value of the harm he had done. 5. But if a worthy slave becomes a depraved character and is killed within a year, his value will be calculated according to what he was worth before he changed his ways. 6. In short, we must say that all those useful things that made the slave worth more within the year in which he was killed are to be added to his value. 7. If a baby not yet a year old is killed, the better view is that this action will meet the case by referring the valuation to that part of the year for which he had lived. 8. It is settled that this action is given to heirs and other successors, but it will not be given against an heir or the other successors because it is penal, unless perchance the heir has been made richer as a result of the damage done. 9. If a slave is killed maliciously, it is agreed that his owner can take action also under the *lex Cornelia*; and if he shall already have sued under the *lex Aquilia*, the Cornelian action need not be judged first. 10. The Aquilian action lies for simple damages against a defendant who confesses, but for double against one who denies liability. 11. If someone falsely confesses to killing a slave who is still alive and afterward is ready to show that the slave is still alive, Julian writes that the Aquilian action no longer lies, even though he had confessed to killing; for an action on a confession only relieves the plaintiff from necessarily having to bring proof that the defendant killed the slave; it is still necessary that the slave must actually have been killed by someone or other.

24 PAUL, *Edict, book 22:* This is more obvious in a case about a wounded slave; for if someone confesses to wounding when the slave was not hurt, what wound are we to value, or to what time shall we reckon back?

25 ULPIAN, *Edict, book 18:* Accordingly, if a slave has not been slain but has nevertheless died, the better view is that the defendant is not liable for the dead slave, even though he may have confessed. 1. If a procurator or tutor or curator or some such agent confesses to a wounding by their absent principal an *actio utilis* on the confession must be given against them. 2. It must be noted that in this action which is given against the confessor the judge is appointed not to decide liability but only to assess the damages; for none of the elements of the judicial function is present in such cases of confession as these.

26 PAUL, *Edict, book 22:* Just suppose that someone who has been summoned confesses to a killing and is prepared to pay the damages, but his opponent claims an excessive amount.

27 ULPIAN, *Edict, book 18:* If a slave carries off and kills someone else's slave, both Julian and Celsus write that actions lie for both theft and wrongful damage. 1. If a slave in common ownership, mine and yours, kills another slave of mine, the *lex Aquilia* lies against you if he did it with your consent. Urseius reports that this was the opinion held by Proculus; but he says that if the slave did it without your consent, a noxal action will not lie in case it might be in the power of the slave to decide which he might serve exclusively; and I think this is correct. 2. Again, if a slave owned by you and me in common is killed by the slave of Titius, Celsus writes that if either of us sues, he should recover the assessed value of his share or noxal surrender will have to be made of the miscreant as a whole, because this solution is not susceptible of division. 3. The owner is held liable in respect of a slave who kills, but not a person whom he is serving in good faith; but it has been questioned whether he who has a runaway slave is liable on his account under the *lex Aquilia.* Julian says he is liable and this is undoubtedly so; for Marcellus also agrees. 4. The second chapter of the *lex Aquilia* has fallen into disuse. 5. In its third chapter the *lex Aquilia* says: "In the case of all other things apart from slaves or cattle that have been killed, if anyone does damage to another by wrongfully burning, breaking, or spoiling his property, let him be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days." 6. If, therefore, someone does not kill, but burns, smashes, or spoils a slave or beast, there is no doubt that action may be brought under these words of the *lex.* Accordingly, if you throw a lighted torch at my slave and singe him, you will be liable to me. 7. Again, if you set fire to my orchard or my country house, I shall have the Aquilian action. 8. If someone wished to burn down my tenement building and the fire spread to my neighbor's block of flats, he will be liable to my neighbor too.

Under the *lex Aquilia*, he will also be liable just the same to the tenants in respect of their property that is burnt. 9. If a tenant farmer's stoker-slave drops asleep at the furnace and the house is burned down, Neratius says that the tenant must nevertheless make good the damage in accordance with the agreement in the contract of letting, if he was negligent in choosing his workers. But if one man lighted the furnace but another watched it carelessly, will the one who lighted it be liable? For he who watched it did nothing, while the one who lighted it properly was not at fault. What is the answer? I think that an *actio utilis* lies just as much against the man who fell asleep at the furnace as against him who watched it negligently, nor can anyone say that he who fell asleep was only afflicted by a normal human failing; for it was his duty either to put out the fire or to take such care that it did not escape. 10. If you have an oven against a party wall will you be liable for wrongful damage? Proculus says there can be no action because there is no similar liability on the part of a man who has a fireplace, but I think it would be fairer for an *actio in factum* to be given if perchance the wall were burned down. On the other hand, if you have not yet done me any damage, but you have such a fire that I fear that you will cause me damage, I think your giving security against threatened damage should suffice. 11. Proculus says that when the slaves of a tenant farmer have burned down the country house, the tenant is liable either on the contract of tenancy or under the *lex Aquilia*, but with the privilege that the tenant is able to hand over the slaves for punishment. And if the case is decided in one of these actions, the other cannot be brought in addition. But the position is thus only if the tenant farmer was free of fault. On the other hand, if he had culpable slaves, he will be liable for resulting harm by reason of having such slaves. He writes that the same rule must apply also to the lodgers in a hostel. 12. If, when my bees had flown off to join yours, you burn them out, Celsus says the action on the

lex Aquilia lies. 13. The statute actually says *ruperit* [break or rend asunder]; but almost all the early jurists understood the word to mean *corruperit* [spoil]. 14. And so Celsus asks, if you sow tares or wild oats in another man's crops and spoil them, not only can the owner bring the interdict against damage caused secretly or by force, but he can also proceed *in factum* under the *lex Aquilia*; and if a tenant farmer proceeds thus he must give an undertaking that there will be no further legal proceedings, for example, lest his landlord should seek to bring a further action. For it is one sort of damage to spoil or alter something so that the *lex Aquilia* applies and quite another to add something that it is a nuisance to separate, but without any other change being made. 15. Celsus says that clearly the Aquilian action can be brought against someone who adulterates wine or pours it away or makes it sour or spoils it in any other way, because even pouring it away or making it sour are comprised within the term "spoil." 16. And he does not deny that breaking and burning are included within the term "spoiling" and says that there is nothing new in that a statute, after enumerating some cases specially, should add a general term which embraces those specific things; and this view is correct. 17. We accepted that "to rend asunder" includes the case of him who wounds a slave either with a rod or whip or fist or strikes him with a weapon or in any other way that cuts him or makes a bruise, but only if wrongful damage is caused thereby. However, if he makes the slave in no way less valuable or less useful, the Aquilian action will not lie, and the action for insult will have to be brought so far as this matter is concerned; for the Aquilian action avenges only those cases of breakage which cause loss. Therefore, if a slave has not been rendered worse in point of his value, but expense is incurred in making him fit and healthy, it seems to me that in this respect loss has been caused, and accordingly it is possible to proceed under the *lex Aquilia*. 18. If someone tears or stains clothes, he is liable under the *lex Aquilia* as if he had broken something. 19. And again, if someone pours my millet or corn into a river, the Aquilian action provides for this case. 20. Again, if someone mixes up corn with sand or some other such thing so that separation is hard, it is possible to bring action as for spoiling. 21. If a man knocks coins out of my hand, Sabinus thinks that there is an action for wrongful damage if they roll away and thus do not come into someone else's hands, if, for example, they fall into a river or the sea or into a drain. But if they come into someone else's possession, an action for aiding and abetting theft may be brought, and the early jurists held this view. Sabinus says that an *actio in factum* can also be given. 22. If a slave or a mare has a miscarriage because of a blow struck by you, Brutus says that you are liable to an Aquilian action just as in the case of a breaking. 23. And he also says that if a man overloads a mule and breaks some part of its body, the Aquilian action lies. 24. Vivianus writes that there is an Aquilian action, the same as for a breaking, if someone deliberately sinks a merchant ship.

25. If someone harvests olives before their due season or cuts down green corn or unripe grapes, he is liable under the *lex Aquilia*; but if they are ripe for harvest, the Aquilian action does not lie, as no wrongful harm has been done; rather, he has made you a gift of the costs involved in harvesting a crop of this nature. But if he makes off with a crop after collecting it, he is liable for theft, unless, Octavenus adds in the case of the grapes, he threw them down on the ground so that they were a dead loss. 26. He says the same about trees that can be cut; if they are not yet ready, he who cuts them is liable under the *lex*; but if he cuts ripe wood, he will be liable for theft and for cutting timber furtively. 27. But if you thin a willow thicket so as not to harm the trunks, you will not be liable under the *lex Aquilia*. 28. Further, if someone castrates your slave-boy and thus increases his value, Vivianus writes that the *lex Aquilia* should not apply, but that you should instead bring the action for insult or sue under the edict of the aediles for four times his value. 29. If you hand over a cup for filigree work to be done, the jeweler will be held liable if he breaks it through lack of skill, but if it breaks not through his lack of expertise but because it has weakening cracks he can be exonerated; and accordingly, craftsmen usually contract when things of this sort are entrusted to them that the work shall not be done at their risk, and this provision excludes their liability both under the contract for their professional services and under the *lex Aquilia*. 30. When a husband has given his wife some pearls and she pierces them so that they can be worn as a necklace, either against the will of her husband or without his knowledge, she is liable under the *lex Aquilia* whether she is divorced or still married. 31. If someone breaks down or staves in the doors of my house or smashes down the house itself, he is liable under the *lex Aquilia*. 32. If he wrecks my aqueduct, even though the materials which are smashed down are mine, nevertheless because it is not my land over which I bring the water, it is better to say that an *actio utilis* should be given. 33. If a stone falls out of a cart and ruins or smashes something, it is agreed that the carter is liable to the Aquilian action if he loaded the stones badly, and it is for this reason that they fell. 34. If a man entrusts a hired slave with the driving of his mule and the slave ties it by the halter to his thumb but the mule tears itself away wrenching off his thumb and falls headlong, Mela writes that if the slave was inexperienced but was hired out as an expert, an action can be brought against the slave's owner on the contract of hire for damaging or disabling the mule; but if the mule was upset by someone hitting or scaring it, then the owner (that is, the mule's owner as well as the slave's owner) will have an action under the *lex Aquilia* against him who frightened it. However, it seems to me that on the same facts that found an action on the contract, an action under the *lex Aquilia* also lies. 35. Again, if you hire someone to mend a vat full of wine and he punctures it so that all the wine runs out, Labeo maintains that an *actio in factum* must be brought.

28 PAUL, *Sabinus, book 10:* People who dig pits to catch bears and deer are liable under the *lex Aquilia* if they dig such pits in a public place and something falls in and is damaged, but there is no such liability for pits made elsewhere, where it is usual to make them. 1. But this action is only given for good reason, that is, if no warning was given and the plaintiff did not know of the danger, nor could he have foreseen it; and many cases of this sort can be seen in which the plaintiff fails, because he could have avoided the danger.

29 ULPIAN, *Edict, book 18:* as, for example, if you set traps in a place where you had no right to put them and your neighbor's cattle fall into them. 1. If you cut back my projecting roof which I had no right to have above your house, Proculus writes that I can proceed against you for wrongful damage; for you should have brought an action against me to establish that I had no right to a projecting roof, nor is it just that I should suffer damage from your cutting back my beams. There is a decision otherwise in a rescript of the Emperor Severus, who laid down that a person through whose house a water pipe had been laid (other than in accordance with an easement) could in his own right smash it up; and very properly, for the difference is that the former made the projection on his own land, whereas the latter acted on another's. 2. If your boat causes me damage through colliding with my skiff, it is a question which action is open to me. Proculus says that if it was in the power of the sailors to prevent the collision and it happened through their fault, an action under the *lex Aquilia* can be brought against them, because it matters little whether you do damage by letting your boat run loose or by bad steering or even with your own hand, because in all these ways I suffer damage caused by you; but if a rope broke or the vessel ran into mine when no one was in control of it, no action can be brought against the owner. 3. Furthermore, Labeo writes that when a ship was blown by the force of the wind into the anchor ropes of another vessel and the sailors cut the ropes, no action should be allowed if the vessel could be extricated in no other way than by severing the ropes. And both Labeo and Proculus thought the same about fishermen's nets in which a fishing boat got caught; but clearly, if this was caused through the fault of the sailors, action could be brought under the *lex Aquilia.* But where action is brought for wrongful damage to the nets no account is to be taken of the fish which were not caught because of the damage, as it is so uncertain whether they would have been caught. The same is true in the cases of the prospective catches of both hunters and bird catchers. 4. If a ship sinks another vessel coming toward it, Alfenus says that an action for wrongful damage lies either against the helmsman or against the captain; but if the ship was subject to such forces that it could not be managed, no action should be given against the owner. However, if the collision was caused by fault on the part of the sailors, I think that affords a basis for the Aquilian action. 5. If a man cuts a ship's mooring rope, an *actio in factum* can be brought in respect of the ship which is lost in consequence. 6. One can sue by the action under this chapter of the *lex Aquilia* for damage to all animals which are not classed as cattle, for example, damage to dogs; and the same may be said of boars and lions and all other wild beasts and birds. 7. Municipal magistrates may also be liable under the *lex Aquilia* if they do any damage unlawfully. So if one of them seizes your cattle by way of security and kills them by starvation because he would not allow you to take them food, you must be allowed an *actio in factum.* Again, if he thinks he is taking security under the provisions of a statute but he does not take it in accordance with the law and he returns your things worn and spoiled, it is said that the *lex Aquilia* applies. And, indeed, the same must be said even if he did make the seizure properly under the statute; but, on the other hand, if a magistrate does some injury by violence against someone who resists lawful process, he will not be liable under the *lex Aquilia;* for even when a slave taken in execution has hanged himself, no action lies. 8. It is settled that the words "whatever was the value in the last thirty days," even though they do not include "highest," must be accepted in that sense.

30 PAUL, *Edict, book 22:* A man who kills another's slave caught in the act of adultery will not be liable under this *lex.* 1. If a slave given as a pledge is killed, the action is available to the debtor. But it is asked whether an *actio utilis* should be given to the creditor because he may have an interest either because the debtor is not solvent or because he has lost his own right of action through lapse of time. But it is unjust that the defendant should be liable to both owner and creditor, unless one might think that the debtor should suffer no injustice in this case; for he is benefited by the amount of his debt and whatever is recovered in excess of the debt can be recovered from the

defendant; or perhaps from the start action should be allowed to the debtor for the excess of the damages over the debt. And so in these cases in which an action is given to the creditor because of the poverty of his debtor or because he has lost his right of action, the creditor will have the action under the *lex Aquilia* up to the amount of the debt, so that this benefits the debtor, but the Aquilian action is open to the debtor in respect of any amount exceeding the debt. 2. If someone consumes another's wine or corn this does not seem to be unlawful damage, and so an *actio utilis* should be given. 3. In the action which arises under this title, both intentional and negligent wrongdoing is punished; and so, if a man sets fire to stubble or thorns in order to burn them up and the fire escapes further afield and spreads and burns another's crops or vineyard, we shall ask whether this occurred through his inexperience or negligence. If he did it on a windy day, he is guilty of a mischief (for even he who provides the opportunity is deemed to have done the harm); and he who did not see to it that the fire did not spread stands in the same position. But if he saw to everything that he should have done or it was a sudden squall of wind that extended the fire, he is free of fault. 4. If a slave is wounded, but not mortally, and he dies of neglect, the action will be for wounding, not for killing.

31 PAUL, *Sabinus, book 10:* If a pruner threw down a branch from a tree and killed a slave passing underneath (the same applies to a man working on a scaffold), he is liable only if it falls down in a public place and he failed to shout a warning so that the accident could be avoided. But Mucius says that even if the accident occurred in a private place, an action can be brought if his conduct is blameworthy; and he thinks there is fault when what could have been foreseen by a diligent man was not foreseen or when a warning was shouted too late for the danger to be avoided. Following the same reasoning, it does not matter much whether the deceased was making his way through a public or a private place, as the general public often make their way across private places. But if there is no path, the defendant should be liable only for positive wrongdoing, so he should not throw anything at someone he sees passing by; but, on the other hand, he is not to be deemed blameworthy when he could not have guessed that someone was about to pass through that place.

32 GAIUS, *Provincial Edict, book 7:* It has been asked whether the practice of the proconsul in cases of theft by a gang of slaves (that is, that the demand of the penalty should not be allowed against each one individually, but it suffices if payment is made of what would have been due had one free man done the theft) should be followed also in an action for unlawful damage. But it has seemed best that the same rule should be observed and rightly too; for the reasoning in the action for theft is that the owner of the slaves should not lose his whole household because of one delict; and the same reasoning being similarly applied to a case of wrongful damage, it follows that the same assessment of damages should be made especially as this form of delict is often less serious, as, for instance, when damage is done by negligence and not by malice. 1. If the same person wounds and then afterward kills the same slave, he will be held liable for both a wounding and a killing; for there are two delicts. It is otherwise when one kills by many blows delivered in the same attack; for then there will be but one action for killing.

33 PAUL, *Plautius, book 2:* If you kill my slave, I think that personal feelings should not be taken into account (as where someone kills your natural son whom you would be prepared to buy for a great price) but only what he would be worth to the world at large. Sextius Pedius says that the prices of things are to be taken generally and not according to personal affections nor their special utility to particular individuals; and accordingly, he says that he who has a natural son is none the richer because he would redeem him for a great price if someone else possessed him, nor does he who possesses someone else's son actually have as much as he could sell him for to his father. For under the *lex Aquilia*, we sue for the amount of the harm suffered, and we are said to have lost either whatever we could have gained or what we are obliged to pay out.

1. In cases of damage not covered by the *lex Aquilia*, an *actio in factum* is given.

34 MARCELLUS, *Digest, book 21:* The slave Stichus was bequeathed to both Titius and Seius. While Seius was still making up his mind, when Titius had already claimed the legacy, Stichus was killed. Thereupon, Seius renounced the legacy. Then Titius can proceed as if he were the sole legatee,

35 ULPIAN, *Edict, book 18:* because his ownership is deemed to have accrued to him retrospectively.

36 MARCELLUS, *Digest, book 21:* For just as a legacy becomes the heir's when a legatee has renounced it, so does Titius have the action as if he were the sole legatee. 1. If the owner directs that a slave whom Titius has mortally injured should be freed and become his heir and later Maevius succeeds him, Maevius will not have an action against Titius under the *lex Aquilia*, at least according to the opinion of Sabinus, who thought that no action could be transmitted to the heir which was not open to the deceased; and indeed it would turn out absurd if the heir could recover damages as a consequence of the killing of the person whom he succeeded as heir. But if the master had ordered the freed slave to be a part-heir, his co-heir could proceed under the *lex Aquilia* on account of his death.

37 JAVOLENUS, *From Cassius, book 14:* If a free man acting under orders causes damage by his own hand, the action under the *lex Aquilia* lies against the person who gave the orders, provided he had a right to give them; but if he had no such right, the action must be brought against the actual wrongdoer. 1. If a quadruped, on account of which a *pauperies* action is being brought against its owner, is killed by someone else and an Aquilian action is brought against the killer, the damages must be assessed not according to the beast's physical value, but in the light of liability in the case involving the *pauperies* action, and accordingly, he who killed it must be condemned in the Aquilian action to pay the amount that it would have profited the owner to make a noxal surrender rather than pay the damages as assessed.

38 JAVOLENUS, *Letters, book 9:* It is generally agreed that I have a good case against you under the *lex Aquilia* if my slave, whom you had bought in good faith, was wounded by one of your own slaves while he was in your service.

39 POMPONIUS, *Quintus Mucius, book 17:* Quintus Mucius writes as follows: A mare was grazing in someone else's meadow and when she was driven out, she miscarried, as she was pregnant. It was asked whether or not her owner could sue, under the *lex Aquilia*, the person who drove her off, because in striking her he had done her an injury. It was thought that the owner could bring action if he had struck her too hard or purposely driven her too violently. 1. Pomponius says that even though a person finds someone else's cattle on his land, he should show the same care in driving them off as if those he had found were his own; for if he has suffered any harm on their account, he has his own legal remedies. And, therefore, he who finds someone else's cattle in his field may not lawfully impound them, nor must he drive them out other than as we have just said above, that is, as though they were his own; but he must either remove them without hurting them or tell their owner, so that he can come and collect them.

40 PAUL, *Edict, book 3:* If I allege that my handwritten receipt has been erased when it had been recorded that I was owed a sum of money subject to a condition, and for the present I am able to prove this by witnesses who may not be available when the

condition is fulfilled, I ought to win the case under the *lex Aquilia* if I can briefly lead evidence to get the judge to accept the likely truth of my tale; but then it is open to me to enforce the judgment only after the condition attached to the debt has been fulfilled; so if it fails, the judgment will have no force.

41 ULPIAN, *Sabinus, book 41:* Let us see whether an action lies for willful damage if a man destroys a will. Marcellus, doubting this in the fifth book of his *Digest*, says that such action does not lie; for how, he says, can the damage be assessed? I made a note in his book that this is certainly true from the testator's point of view; for his interest cannot be valued, but that it is otherwise for an heir or a legatee; for to them wills are almost like signed receipts, and in the very same book, Marcellus writes that when a receipt is erased, action lies under the *lex Aquilia.*

And if someone who is looking after someone's will makes an erasure or reads it out with other people present, it is better to bring an action *in factum* or sue for *injuria* if he published the secrets of one's legal affairs with an insulting intent. 1. Pomponius most elegantly says that sometimes it happens that a man does not render himself liable for theft by destroying a document, but he does incur liability for wrongful damage, as, for instance, where he does it with that intent. He will not then be liable for theft, because theft requires the deed to be accompanied by theftuous intent.

42 JULIAN, *Digest, book 48:* Anyone who is looking after a will or a title deed and alters it so that it cannot be read is liable to an action on the contract of deposit and also to an action for its production in court because he has returned and produced the thing in a damaged state. The Aquilian action also lies on these same facts; for it is rightly said that he who has falsified a document has spoiled it.

43 POMPONIUS, *Sabinus, book 19:* You have an action under the *lex Aquilia* on account of damage done to property comprised in your inheritance before you took it up but after the death of the person whose heir you are; for the *lex Aquilia* does not regard as "owner" only him who was owner at the time the damage was done. If that were so, right of action could not pass from an ancestor to his heir, nor could you sue on your return home on account of what was done to your property while you were a prisoner of war. The law could not be otherwise without great unfairness to posthumous children who are heirs to their fathers. We shall also say the same about trees cut down secretly during the same period. I think also that the same can be said about the special action for damage inflicted by force or in secret which lies if a person causes damage after express prohibition or if it becomes clear that he ought to have known that he would have been warned off by those to whom the inheritance belonged.

44 ULPIAN, *Sabinus, book 42:* Under the *lex Aquilia* even the slightest degree of fault counts. 1. Whenever a slave does a wounding or killing with his master's knowledge, the master is without doubt liable to the Aquilian action.

45 PAUL, *Sabinus, book 10:* We accept knowledge here as including sufferance, so that he who could have prevented harm is liable for not doing so. 1. One can proceed under the *lex Aquilia* even if a wounded slave recovers. 2. If you kill my slave, believing that he is a freeman, you will be liable under the *lex Aquilia.* 3. When two slaves were jumping over some burning straw, they bumped into each other, fell, and one was burned to death. No action can be brought on that account if it is not known

which was knocked over by which. 4. Those who do damage because they cannot otherwise defend themselves are blameless; for all laws and all legal systems allow one to use force to defend oneself against violence. But if in order to defend myself I throw a stone at my attacker and I hit not him but a passerby, I shall be liable under the *lex Aquilia*; for it is permitted only to use force against an attacker and even then only so far as is necessary for self-defense and not for revenge. 5. A person who removes a sound wall is liable to its owner for wrongful damage.

46 ULPIAN, *Sabinus, book 50:* If action has been brought under the *lex Aquilia* when a slave has been wounded, one can nonetheless bring another action under the *lex* if he later dies of the wound.

47 JULIAN, *Digest, book 86:* But if after damages have been assessed in the first action and then when the slave has died his owner starts proceedings for the killing, he will be prevented by the plea of fraud from recovering more in the two actions than he would have won by bringing an action for the killing in the first place.

48 PAUL, *Edict, book 39:* If a slave damages property in an inheritance before the heir takes it up and then does other damage to that same property after he has been freed, he will be liable to both actions because these actions arise from separate causes.

49 ULPIAN, *Disputations, book 9:* If someone drives away, or even kills, another's bees by making smoke, he seems rather to have provided the cause of their death than directly to have killed them, and so he will be liable to an action *in factum*. 1. What is said about suing under the *lex Aquilia* for damage done wrongfully must be taken as meaning that damage is done wrongfully when it inflicts wrong together with the damage, and this is inflicted, except where it is done under compulsion of overwhelming necessity, as Celsus writes about the man who pulled down his neighbor's house to keep a fire off his own; for he writes here that there is no action under the *lex Aquilia*, because he pulled down the adjoining house in the reasonable fear that the fire would reach his own house. Celsus also thinks that there is no action under the *lex*, regardless of whether the fire would actually have reached him or been put out first.

50 ULPIAN, *Opinions, book 6:* But he who pulls down someone else's house against the owner's will and puts up baths on the site is liable to an action for the damage caused, quite apart from the rule of natural law that whatever is built on land belongs to the owner of the land.

51 JULIAN, *Digest, book 86:* A slave who had been wounded so gravely that he was certain to die of the injury was appointed someone's heir and subsequently killed by a further blow from another assailant. The question is whether action under the *lex Aquilia* lies against both assailants for killing him. The answer was given as follows: A person is generally said to have killed if he furnished a cause of death in any way whatever, but so far as the *lex Aquilia* is concerned, there will be liability only if the death resulted from some application of force, done as it were by one's own hand, for the law depends on the interpretation of the word *caedere*. Furthermore, it is not only those who wound so as to deprive at once of life who will be liable for a killing in accordance with the *lex* but also those who inflict an injury that is certain to prove fatal. Accordingly, if someone wounds a slave mortally and then after a while someone else inflicts a further injury, as a result of which he dies sooner than would otherwise have been the case, it is clear that both assailants are liable for killing. 1. This rule has the authority of the ancient jurists, who decided that, if a slave were injured by several persons but it was not clear which blow actually killed him, they would all be liable under the *lex Aquilia*. 2. But in the case that we are considering, the dead slave will not be valued in the same way in assessing the penalty to be paid for each wound. The person who struck him first will have to pay the highest value of the slave in the preceding

year, counting back three hundred and sixty-five days from the day of the wounding; but the second assailant will be liable to pay the highest price that the slave would have fetched had he been sold during the year before he departed this life, and, of course, in this figure the value of the inheritance will be included. Therefore, for the killing of this slave, one assailant will pay more and the other less, but this is not to be wondered at because each is deemed to have killed him in different circumstances and at a different time. But in case anyone might think that we have reached an absurd conclusion, let him ponder carefully how much more absurd it would be to hold that neither should be liable under the *lex Aquilia* or that one should be held to blame rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide if one is more blameworthy than the other. Indeed, it can be proved by innumerable examples that the civil law has accepted things for the general good that do not accord with pure logic. Let us content ourselves for the time being with just one instance: When several people, with intent to steal, carry off a beam which no single one of them could have carried alone, they are all liable to an action for theft, although by subtle reasoning one could make the point that no single one of them could be liable because in literal truth he could not have moved it unaided.

52 ALFENUS, *Digest, book 2:* If a slave were to die as the result of an assault and without any contributory factor like neglect on the part of his owner or lack of professional skill in a doctor, an action may properly be brought for killing him wrongfully. 1. One night a shopkeeper had placed a lantern above his display counter which adjoined the footpath, but some passerby took it down and carried it off. The shopkeeper pursued him, calling for his lantern, and caught hold of him; but in order to escape from his grasp, the thief began to hit the shopkeeper with the whip that he was carrying on which there was a spike. From this encounter, a real brawl developed in which the shopkeeper put out the eye of the lantern-stealer, and he asked my opinion as to whether he had inflicted wrongful damage, bearing in mind that he had been hit with the whip first. My opinion was that unless he had poked out the eye intentionally, he would not appear to have incurred liability, as the damage was really the lantern-stealer's own fault for hitting him first with the whip; on the other hand, if he had not been provoked by the beating, but had started the brawl when trying to snatch back his lantern, the shopkeeper would appear to be accountable for the loss of the eye. 2. Some mules were pulling two loaded carts up the Capitoline. The front cart had tipped up, so the drivers were trying to lift the back to make it easier for the mules to pull it up the hill, but suddenly it started to roll backward. The muleteers, seeing that they would be caught between the two carts, leaped out of its path, and it rolled back and struck the rear cart, which careened down the hill and ran over someone's slave-boy. The owner of the boy asked me whom he should sue. I replied that it all depended on the facts of the case. If the drivers who were holding up the front cart had got out of its way of their own accord and that had been the reason why the mules could not take the weight of the cart and had been pulled back by it, in my opinion no action could be brought against the owner of the mules. The boy's owner should rather sue the men who had been holding up the cart; for damage is no less wrongful when someone voluntarily lets go of something in such circumstances and it hits someone else. For example, if a man failed to restrain an ass that he was driving, he would be liable for any damage that he caused, just as if he threw a missile or anything else from his hand. But if the accident that we are considering had occurred because the mules had shied at something and the drivers had left the cart for fear of being crushed, no action would lie against them; but in such a case, action should be brought against the owner of the mules. On the other hand, if neither the mules nor the drivers were at fault, as, for example, if the mules just could not take the weight or if in trying to do so they had slipped and fallen and the cart had then rolled down the hill because the men could not hold it when it tipped up, there would be no liability on the owner or on the drivers. It

is quite clear, furthermore, that however the accident happened, no action could be brought against the owner of the mules pulling the cart behind; for they fell back down the hill not through any fault of theirs, but because they were struck by the cart in front. 3. A man sold some oxen on approval, but while they were on trial, one of them gored the buyer's slave. My opinion was taken as to the seller's liability for the damage. I said that if the oxen had already been bought, he would not be liable, but if they were still on approval, he would be, if the goring had happened because the ox was vicious, though he would not be responsible if it had been the slave's own fault. 4. Take this case of some people playing ball. One of them pushed a little slave-boy when he was trying to pick up the ball, and he fell and broke his leg. When I was asked if I thought his owner could sue the person who had pushed him over, I replied that he could not, as it seemed to me to be a purely accidental injury.

53 NERATIUS, *Parchments, book 1:* You have driven someone else's oxen into a narrow place, and the result was that they fell over a precipice. An *actio in factum* based on the *lex Aquilia* will be given against you.

54 PAPINIAN, *Questions, book 37:* An action under the *lex Aquilia* is available to a debtor when a person to whom an animal has been contractually promised wounds that animal before the time of performing the contract has passed; and the same is true if he kills the animal. But if the promisee kills it when the promisor is in default on his promise, even though the debtor may be released, this is not an occasion when the *lex Aquilia* can properly be brought into operation; for the creditor is deemed to have done an injury to himself rather than to anyone else.

55 PAUL, *Questions, book 22:* I promised to Titius either one of two slaves, Stichus or Pamphilus, Stichus being worth ten thousand and Pamphilus twenty thousand. Titius killed Stichus before I was in default. A question was then put about an action under the *lex Aquilia.* I answered: Since it is put that he has killed the cheaper of the two, for the purposes of this case the creditor is in no different position from any third party. What, then, should the measure of damages be: ten thousand, that is, the value of the dead Stichus, or the value of the one I should now hand over? In other words, what is the value of my interest? What should we say if Pamphilus also dies without any default on my part? Will the value of Stichus be less because the promisor is released from his obligation? It is enough to say that he was worth more when he was killed or within a year. On this principle, even if he were killed within a year of the death of Pamphilus, he will be deemed to have been worth the greater value.

56 PAUL, *Views, book 2:* If a wife causes damage to her husband's property, she can be sued under the *lex Aquilia.*

57 JAVOLENUS, *From the Posthumous Works of Labeo, book 6:* I lent you a horse, and when you were out on it in the company of a number of riders, one of them bumped into you and threw you off, and in the accident the horse's legs were broken. In such a case, Labeo would have it that there is no action against you, but that if it happened because of a rider's negligence, there would be a right of action against that rider. He says it is clear that no action lies against the owner of the horse, and I agree.

3

THOSE WHO POUR OR THROW THINGS OUT OF BUILDINGS

1 ULPIAN, *Edict, book 23:* The praetor says the following about those who pour out or throw out anything: "If anything should be thrown out or poured out from a building onto a place where people commonly pass and repass or stand about, I will grant an action to be brought against whoever lives there for double the damage caused or done as a result. If it is alleged that a free man was killed by whatever fell, I will grant an

action for fifty aurei. If he is alleged to be injured, but survives, I will grant an action for whatever it seems right to the judge that the defendant should be condemned to pay. If a slave is alleged to have done it without his master's knowledge, I will add to the judgment or noxally surrender him." 1. There is no one who will deny that the above edict of the praetor is most useful; for it is in the public interest that everyone should move about and gather together without fear or danger. 2. It should be a matter of little interest whether the place [where the harm occurs] is public or private ground, so long as the public pass there, because the edict is concerned with protecting passersby rather than regulating public streets, and those places where people habitually pass by should at all times enjoy equal safety. On the other hand, if the public gave up passing along a particular way and then something was poured out or thrown down while it was still closed, but thereafter it began to be used again, there would be no liability under this edict. 3. Something which falls while it is being hung up should rather be deemed thrown down; but even when it falls down after being hung up, the better opinion is that it too is regarded as having been thrown down. From this proposition it follows that if something is poured from a suspended vessel, even though no one did the actual pouring, we must still hold that the edict applies. 4. This *actio in factum* is given against him who occupies the house when anything is thrown down or poured out and not the owner; for the fault rests with the former. Nor is there added any mention of fault or of the defendant denying the facts, so that he becomes liable for double the damages although these are both factors of liability in an action for unlawful damage. 5. When a freeman is killed, there is no doubling of the amount of loss because in the case of a freeman no valuation of his body is possible, but the condemnation will be for fifty aurei. 6. These words "if he is alleged to be injured but survives" do not refer to damage which is done to the property of a freeman, if, for example, his clothes or anything else of his is torn or spoilt, but apply only to matters affecting his body. 7. If a son-in-power has hired an upper room and something is thrown down or poured out from there, an action on his *peculium* is not granted against the head of the family because the claim does not arise from the contract of hire. This action, therefore, lies against the son himself. 8. When a slave is the occupier, will a noxal action be allowed, since there is none for unauthorized administration? Or will there be an action on the *peculium*, because there is no action on a slave's delict? Nor can we properly speak of harm on the part of the slave because the slave himself harmed nothing. For my part, I do not think that the slave should go unpunished, but that he should be corrected on special application under the court's extraordinary jurisdiction. 9. We hold that a man occupies a house if it is his own or if it is let to him or if he is there as a favor. A guest is clearly not liable, because he does not occupy the house but is only entertained there; but the one liable is the person who gives the entertainment. There is as much difference between an occupier and a guest as between someone who lives there and a stranger. 10. If a number of people occupy a lodging house and something is thrown down from it, action may be brought against any one of them,

2 GAIUS, *Provincial Edict, book 6:* because it is quite impossible to know which one threw or poured out anything,

3 ULPIAN, *Edict, book 23:* and each is liable for the whole damage; but if action is brought against one, the rest go free,

4 PAUL, *Edict, book 19:* on actual payment, not merely on joinder of issue, the others being made to contribute their shares to the one who paid by an action on partnership or an *actio utilis.*

5 ULPIAN, *Edict, book 23:* However, if several people occupy separate parts of a lodging house, the action lies only against him who occupies that part from which something was poured. 1. If someone gives free accommodation to his own or his wife's freedmen and clients, Trebatius says he is liable in his own name, and this is true. The same must also be said in the case of someone who gives hospitality to his friends on a modest scale; for if, although he lets out lodgings, he occupies most of the house

himself, he alone will be liable; but if a lodging house keeper retains only a small part for himself and lets out the rest to a large number of people, all those who live in that house will be liable as occupiers for whatever is thrown down or poured out. 2. Occasionally, however, provided it can be done without injustice to the plaintiff, the praetor acting in fairness ought rather to grant the action against the person from whose bedroom or sleeping quarters the thing was thrown, even though a number of people share the same lodging. But if something is thrown from the middle of a lodging house, the better view is that all are liable. 3. If a warehouseman or a hirer of a storeroom or a place to do some work or to teach his pupils should throw something down or pour something out an *actio in factum* will lie, even if it was one of his workmen or one of his pupils who did the throwing or pouring. 4. If someone has judgment given against him under the *lex Aquilia* for something of this sort on the ground that his guest or anyone else threw something down from his lodgings, it is right in Labeo's opinion that he should have an *actio in factum* granted to him against the actual thrower, and this is correct. Clearly, if he let the room to the thrower, he also has an action on the contract. 5. This action which is available in the case of things poured out or thrown down cannot be barred by lapse of time and is available for the heir of the plaintiff, but not against the heir of the defendant. But the action which lies in the matter of an allegation that a freeman has been killed is available only for one year and is not granted against an heir, nor can it be brought by an heir or successors generally, for it is a penal action and one which anyone may bring, though we are aware that where a number of people wish to bring this action, preference should be given to one who has a special interest in the matter or who was related to the deceased by blood or marriage. But if a freeman was injured, his own action will not be barred by lapse of time, though if anyone else wishes to pursue the matter, it will expire in a year; nor is it available to the heirs by virtue of hereditary right because the rule is that when any injury is done to the body of a freeman, no claim can pass to his successors by hereditary right, as it is not a matter of pecuniary loss and the action is based upon justice and fairness. 6. The praetor says: "No one shall place anything on an eave or projecting roof over a spot where the public pass or congregate which would injure anyone if it fell. If anyone is in breach of this regulation, I will grant an *actio in factum* against him for ten solidi. If it is alleged that a slave did this without his master's knowledge, I will order [either the same sum to be paid] or that he be

noxally surrendered." 7. This ruling is a part of the edict already referred to; for it followed that the praetor should attend to this case also, so that no harm should befall if anything should be placed on these dangerous parts of a house. 8. The praetor's words refer to "no one" and "on an eave or projecting roof." The words "no one" refer to all persons whether lodgers or owners and whether they live there or not, so long as they have put something in these places. 9. "Anything placed over a spot where the public pass or congregate." We must take the word "placed" to apply to a house or lodging or a warehouse or any other building. 10. A man is rightly deemed to keep a thing "placed" even though he did not put it there himself but simply allows to remain what someone else had put there. Accordingly, if a slave puts it there and his owner allows it to remain, the owner will be liable in his own name and not to a judgment for noxal surrender. 11. The praetor says: "which would injure anyone if it fell." From these words it is clear that the praetor's sole concern in order to prevent harm is with things which could do harm if placed as described and not every sort of thing which is placed there. Nor do we simply watch until the harm occurs, but if anything is likely to cause any harm, the edict applies. And he who kept the thing in place is punished whether the thing so placed actually causes harm or not. 12. If the thing which had been placed falls down and does harm, action lies against him who did the placing, not against him who lives there, as if this action is not enough, because he who placed it does not seem thereby to have kept it placed unless he was either the owner or the occupier of the house. Thus, when a painter had exhibited a shield or a picture in a booth and it fell and injured a passerby, Servius took the view that an action framed on the analogy of this one should be granted. He said that the present action was clearly not available because the picture had not been placed on eaves or on a projecting roof. He was also of the opinion that the same rule should apply if a jar suspended in a net had fallen down and caused damage, because there was no statutory or praetorian action available. 13. This action also is open to anyone and is available for an heir and successors generally, but it cannot be brought against the heir of the defendant because it is penal.

6 PAUL, *Edict, book 19:* This edict applies not only to cities and villages but also to any roads where people commonly pass. 1. Labeo says it applies if something is thrown down during daytime, but not at night; but there are places where people pass by even at night. 2. The occupier is bound to make good his own negligence and that of his family. 3. If something is thrown out from a ship an *actio utilis* will be granted against the person in charge of the ship.

7 GAIUS, *Provincial Edict, book 6:* When a freeman sustains bodily injury by something which is thrown down or poured out, the judge takes account of the cost of medical attendance and other expenses incurred in his recovery as well as the value of any employment which he lost or will have to lose because of his disability. However, no account is taken of scars or disfigurement, because the body of a free man is not susceptible of valuation.

4

NOXAL ACTIONS

1 GAIUS, *Provincial Edict, book 2:* Noxal actions are so called because they are instituted against us not out of contract but because of some damage (*noxa*) or misdeed committed by a slave. The force and effect of such actions is that if judgment is given against us we can avoid having to pay the amount of the condemnation by bodily handing over the wrongdoer.

2 ULPIAN, *Edict, book 18:* If a slave has killed with his owner's knowledge, the owner is liable in full; for he himself is deemed to have done the killing; but if he did not know, the action is noxal; for he should not be held liable for his slave's misdeed beyond handing him over noxally. 1. Whether he remains owner or has ceased to be owner, he who did not prevent the slave is liable to this action. It is enough that he was owner when he did not prevent the misdeed, so much so that Celsus took the view that if the slave was disposed of in whole or in part or was manumitted, the liability for damage does not attach to the person of the slave; for as such he committed no wrong in that he carried out his master's order. And, indeed, if he gave an order, this can be said; but if he simply failed to prevent, how can we excuse the action of the slave? Celsus, however, draws a distinction between the *lex Aquilia* and the *Law of the Twelve Tables*; for under the old law, he says, if a slave committed theft or some other damage with his master's knowledge there is a noxal action on the slave's account and the master is not liable in his own name. But under the *lex Aquilia*, he says, the master is liable on his own account, not that of the slave. He gives the principle of each law—that of the *Twelve Tables* being that in such a case slaves should not obey their masters, whereas that of the *lex Aquilia* was that a slave would be excused for obeying his master because he would have lost his life if he had not done as ordered. But if we take the law as being what Julian writes in his eighty-sixth book, that the words "if a slave commits theft or commits a mischief" are to be applied to later statutes also, it can be maintained that a noxal action can be brought against an owner on his slave's account, so that when an action under the *lex Aquilia* is given against the owner, it does not excuse the slave's act but is simply a burden on the owner. For my part, I have formed an opinion in favor of Julian, whose view accords with principle and with which Marcellus agreed, in a note on Julian.

3 ULPIAN, *Edict, book 3:* In all noxal actions, wherever knowledge on the part of the master is required, "knowledge" must be understood to include instances where he could have prevented the slave but did not do so. It is, however, one thing to instigate the commission of a delict by a slave and quite another to allow him to commit one.

4 PAUL, *Edict, book 3:* In the case of delicts committed by slaves, how is "the master's knowledge" to be understood? Does it mean with connivance? Or is it enough if the master saw the misdeed in circumstances where he could have prevented it, but failed to do so? Suppose, for example, a slave who is taking legal action to assert his freedom commits an offense with his master's knowledge, or suppose he defies him; or suppose the slave is on the other side of a river and commits some harmful act within the sight but against the will of his master. In such cases it seems better to say that "knowledge" should be taken to mean knowledge on the part of someone who has the power to prevent; and this must be understood throughout the whole edict in connection with the word "knowledge." 1. If a stranger's slave commits an offense with my knowledge and I buy him, a noxal action will be granted against me, since he cannot be held to have acted with his master's knowledge when at the time I was not yet his owner. 2. When a master is held liable on the grounds of his knowledge, we should look to see whether an action will also be allowed in respect of the slave himself, unless perchance the praetor intended to exact only a single penalty from the master. In that case, is the slave's misdeed to go unpunished? That would be unjust. On the contrary, the master is held liable both ways, but when one penalty has been paid, whichever the plaintiff chooses, the other is canceled. 3. If noxal surrender is foregone, as when action is brought on the basis of the master being privy to the misdeed, when, in

fact, he was not, once the case is dismissed and the judgment concluded, the plaintiff will be met by a defense of *res judicata* if he attempts to bring further proceedings involving noxal surrender, because the matter was in issue before the court and disposed of in the earlier decision. But so long as the first case is being contested, it is open to the plaintiff, if he has second thoughts about proving the master's knowledge, to change his plea into a noxal action. On the other hand, if he has brought a noxal action against an owner who had knowledge, he will not be granted another action which does not allow the master the alternative of noxal surrender. But if, in the course of the trial, he wishes to establish the owner's knowledge, he should not be prevented from doing so.

5 ULPIAN, *Edict, book 3:* If a slave belonging to several owners commits a delict of which they are all ignorant, a noxal action will be granted against any one of them; but if they all knew, any one of them may be held liable without the alternative of noxal surrender, just as if they had all committed the delict; nor will proceedings against one of two owners free the other. However, if one knew and the other did not, he who knew will be sued without the right of noxal surrender; but an action against the one who did not know will include the option of noxal surrender. 2. The difference between these two cases is not only that he who knows is liable for the full amount, but indeed is also that if he sold or manumitted the slave or if the slave should die, he is still liable as master. But if the master himself dies, his heir is not liable.

6 ULPIAN, *Edict, book 18:* However, the manumitted slave is himself liable.

7 ULPIAN, *Edict, book 3:* A noxal action is not granted against me unless the slave is in my hands, and if he is in my hands, even though he was not at the time when he committed the delict, I am liable and my heir will be liable also after my death if the slave is still living. 1. Pomponius says that if a purchaser of a slave is sued in a noxal action, the vendor who had knowledge when the delict was committed, cannot now be sued.

8 ULPIAN, *Edict, book 37:* If a slave belonging to several owners commits theft, any one of the owners is liable for the full amount of the loss, and this is present law. But the one who is sued cannot evade paying the assessed damage except by noxal surrender of the whole undivided property in the slave, nor is he to be released if he is ready to surrender his own share. It is clear that if he will be condemned to pay his full value because his partners are not prepared to hand over the slave, he can bring action against them for dividing common property or for dividing an inheritance. No doubt before judgment is given in a noxal action, he can guarantee his own position by assigning his share in the slave to the injured party so as not to be liable to the judgment, although it could be argued that once the share has been handed over to him, the plaintiff loses his right of action; for an owner of a share cannot bring a noxal action against a co-owner. Indeed, perhaps he could not even bring an action for dividing common property against a co-owner on account of a misdeed committed before the joint ownership began in which case, if he cannot, he will suffer a clear injustice. But the better view is that the action for dividing common property is available to him.

9 PAUL, *Edict, book 39:* If a gang of slaves or a single slave held in common ownership commits theft with the knowledge of one of the owners, he who knows will be liable on behalf of them all and suing him will release the others; nor will he be able to seek a contribution from his partner, for he incurred the penalty solely on his own account. But if one who had no knowledge incurs a double penalty, he recovers single damages from his partner.

10 PAUL, *Edict, book 22:* Further, one can sue a partner on the ground that he has lessened the value of a jointly owned slave, just as in any other case when he has caused a deterioration of partnership property. However, if there is no other partnership property after the slave has been noxally surrendered an action on partnership can be brought; or if the parties were not partners, an *actio in factum.*

11 ULPIAN, *Edict, book 7:* A possessor of a slave in good faith will be liable for theft on his account and not the owner. But by noxal surrender, he cannot make the plaintiff owner. However, if the owner brings a *vindicatio* for that slave, he will be defeated by the defense of fraud, or the defendant can petition the judge to go free of penalty.

12 PAUL, *Edict, book 6:* If a possessor in good faith gets rid of the slave so held in order to avoid an action against him on noxal grounds, he is nevertheless still liable to that action, which is granted against those who have a slave in their power or have taken fraudulent steps to avoid so having him, because in such a case they are deemed still to be in possession.

13 GAIUS, *Provincial Edict, book 13:* A noxal action is granted not only against a possessor in good faith but also against those who possess in bad faith; for it seems absurd that those who possess in good faith should have to sustain an action while plunderers are protected.

14 ULPIAN, *Edict, book 18:* If someone should be sued by a number of people on account of one slave's misdeed or by one person on account of several delicts, he does not have to offer the assessed damages to all those to whom he cannot hand him over. How then do matters stand if he is sued by several plaintiffs? If one of them institutes proceedings first, will he be in the better position, so that surrender can be made to him alone, or is it rather that the slave must either be surrendered to them all or that the defendant must undertake to defend him against the others? The truth is that the position of the first to sue is indeed stronger. Therefore, the slave will be surrendered not to the plaintiff who sued first, but to the first who gets judgment in his favor; and accordingly, action on the judgment will be denied to him who wins his case subsequently. 1. But if the slave is *statuliber* and before surrender is made the condition of his full freedom is fulfilled or he becomes free under the terms of a *fideicommissum* or that property passes under a pre-existing or present condition attached to a legacy, he [the defendant] must be dismissed from the case by order of the judge; and furthermore, it is a matter for the judge to guarantee that surrenderee against his losing title on account of any future act of the defendant.

15 GAIUS, *Provincial Edict, book 6:* The praetor ought to order that proceedings against the previous owner should be transferred and brought against the recent *statuliber*; but if, when the case comes on, the matter of his freedom is still not resolved, Sabinus and Cassius took the view that an heir should be freed by handing over the slave, because he would thereby surrender all his own rights, and this view is correct.

16 JULIAN, *Digest, book 22:* Should the heir engage in fraud to prevent the *statuliber* being in his power and on that account he receives a judgment which does not involve noxal surrender, he must be condemned even if the condition of freedom had been fulfilled, just as he would also be condemned if the slave had died.

17 PAUL, *Edict, book 22:* If a slave commits a delict of which one of his owners knows while the other is ignorant and action is brought against the one who did not know and he makes noxal surrender of him, it is inequitable that the other owner should go free through the surrender of a worthless slave. Therefore, let action be brought against that other as well, and if any further damages are recovered in that action, their computation will make allowance for the value of the slave who was noxally surrendered. But the co-defendants should account between themselves as in an action for dividing common property so that if he who knew pays the damages, he will not be credited with the proportion of the whole amount paid but only with his proportion of the

amount which the slave was worth; and if the other [ignorant] owner pays anything, that too is in proportion to his share of the slave's worth. It would be unjust that he who ordered the slave to commit the delict should receive anything from his co-owner; for whatever loss he suffers results from his own misdeed. 1. If several people wish to bring a noxal action against me in respect of the same slave or if one person brings several actions on account of one slave in whom you have the usufruct and I the bare legal title, it will fall within the judge's discretion, when I surrender the slave noxally, to ensure that I give the plaintiff the usufruct also. But I, as owner, can make application to the praetor to ensure that he, the praetor, will compel you to contribute to the assessed damages an amount according to the value of the usufruct or to assign the usufruct if that is convenient. And if I, as holder of the bare legal title, do not wish to defend the slave, it is permissible for you to make the defense and if you surrender him under court order, you will be protected from me.

18 POMPONIUS, *Sabinus, book 18:* He who has the usufruct in a slave has the right of action for theft against the owner, just as if he were any other third party, though there can be no action against him even though the slave is in his service; and accordingly, an owner against whom judgment is given can discharge it by making noxal surrender to the usufructuary.

19 PAUL, *Edict, book 22:* If the slave of Titius does damage to property owned in common by you and me, and we sue him, a noxal action on the *lex Aquilia* will lie; but he cannot be compelled to hand over the slave in single ownership to each of us separately. But it can be said, just as in a case where one suffers loss and one claim lies, that either the damages should be offered to both jointly or that by exercise of the judge's discretion, the slave should be handed over to both of us at the same time. However, even if the slave is noxally surrendered to either of us in undivided ownership, and on that account the owner is quit of both of us, it is rightly argued that the one to whom surrender was made can be sued by the other in an action for dividing common property to give up his share in the noxally surrendered slave, because something has come into a co-owner's hands from a jointly owned asset. 1. If the owner of the slave in whom someone else has a usufruct hires out his services, the very words of the edict provide that a judgment against him includes noxal surrender. 2. If your slave is a ship's captain and his underslave working on the ship does damage to that same vessel as a result of which action lies against you, you will be ordered to make noxal surrender of the underslave out of the *peculium* of your slave, just as if the ship's master were a freeman and the underslave were his slave. However, if the underslave did the damage by order of your slave or on his orders or with his knowledge, there should be a noxal action against you on account of your slave. It is the same if he orders any sailor to do damage.

20 GAIUS, *Provincial Edict, book 7:* If someone who brings proceedings at different times for several injuries acquires ownership of the slave on account of one of those injuries, he will not have any further cause of action against him who was the owner, because the noxal action attaches to the delinquent himself. But if the owner preferred to pay the assessed damages in the first action, he can nevertheless still be sued by the same plaintiff or indeed by anyone else on account of any other misdeed.

21 ULPIAN, *Edict, book 23:* Whenever an owner is sued on noxal grounds, if he does not wish to defend the action, the position is that he must noxally surrender the slave on whose account he makes no defense or, if he does not do that, he is absolutely bound to enter a defense, but he will not be condemned unless he has the slave in his power or has fraudulently brought it about that he does not. 1. It is right that slaves on

whose account a noxal action is brought can be defended even in their absence; but this is only so if they belong to the defendant; for if they belong to anyone else or if there is doubt whether they belong to the defendant or anyone else, it is necessary that they be present. This rule must be understood with the proviso that if it is established that they are acting as slaves in good faith, they too can be defended in their absence. 2. The praetor says: "If the person in whose power the slave is said to be denies that he has him in his power, I shall either order him to swear on oath that he is not in his power and that he did not bring it about fraudulently that he is not, or else I shall give an action without the option of noxal surrender, whichever the plaintiff chooses." 3. We must accept the words "in power" to mean that the defendant has the means and ability to produce the slave. Otherwise, if he is on the run or gone abroad, he cannot be deemed to be in power. 4. But if the defendant refuses to swear on oath, he is in the same position as he who will not defend an absent slave nor produce him in court, and he will be condemned for failing to answer a lawful summons. 5. If there is a tutor or curator, they must swear on oath that the slave is not in the power of his owner. However, if there is a procurator, the owner himself must swear. 6. If the plaintiff requires the defendant to swear on oath and he has so sworn and thereafter the plaintiff chooses to proceed by noxal action, it must be considered whether a defense of sworn oath ought to be allowed against the plaintiff. Sabinus holds that no such defense should be granted on that the ground that the oath was sworn on another matter, that is, that the slave was not then in the defendant's power. Now, however, that he is discovered to be in his power action can be brought for what he did. Neratius himself said that after the oath had been demanded the plaintiff could bring action without the option of noxal surrender, provided he is contending that it was only after taking the oath that the defendant came to have the slave in his power.

22 PAUL, *Edict, book 18:* If the slave is the subject of a contract of deposit or loan, a noxal action can be brought against the owner, for the slave is deemed to be still in his service; and, so far as this edict is concerned, he is in his power, especially if he has the means of getting back his slave. 1. A person who accepts a slave as a pledge or a loan at the will of the grantor is not liable to a noxal action. Although such people possess lawfully, they are not in possession in the belief that they are owners, but such slaves are to be understood to be in the power of their owner if the owner has the ability to recover them. 2. What is this ability to recover? When he has the sum of money with which he can free himself from his obligation, but he cannot be compelled to sell his effects to pay the money and recover his slave. 3. An owner who confesses that he has a slave in his power must either produce him in court or defend him in his absence, and if he does neither he is punished in the same way as if the slave were present and he refused to surrender him noxally. 4. If an owner denies that the slave is in his power, the praetor allows the plaintiff the choice whether he would prefer to settle the matter by swearing on oath or whether to proceed to judgment without the option of noxal surrender. If he does the latter, he will win his case if he proves that the slave was in the defendant's power or that the defendant has fraudulently caused him not to be so, but a plaintiff who fails to prove the slave is in the defendant's power loses his case.

23 GAIUS, *Provincial Edict, book 6:* But, on the other hand, if his opponent should come into possession of the slave at a later time, he is liable because of this new possession and will be denied a defense.

24 PAUL, *Edict, book 18:* A matter for consideration is whether a noxal action lies against someone who perpetrates some fraud as a result of which he does not have the slave in his power, if it is as a result of that fraud that the action cannot be brought (for example, if he orders his slave to run away), or whether action can still be brought

against someone else (which happens when the slave is freed or transferred to someone else). This latter is the better view in which case the plaintiff has a choice whom he wishes to sue. Julian, indeed, says in the case of a person who manumits a slave that, if the freed slave is prepared to defend himself, a defense should be granted to the manumittor. And Labeo says the same also.

25 GAIUS, *Provincial Edict, book 6:* The law is the same if the new owner of the slave submits to a trial.

26 PAUL, *Edict, book 18:* The choice of one releases the other; for the praetor introduced the right of election so that the plaintiff should not be cheated rather than that he should make a profit, and accordingly he will be met by a defense in any other action. 1. It follows from these principles that if several people engage in fraud so as not to have the slave in their power, the plaintiff must choose which of them he wishes to sue. 2. Again, if some of a number of co-owners fraudulently cease to be possessors of their shares, the choice is for the plaintiff whether he wishes to proceed by direct action against a party who is in possession or by praetorian action against one who has ceased to be in possession. 3. If someone confesses in court that someone else's slave is his, either one is freed from liability by the payment of other. 4. If a slave whom you ceased to own by fraudulent means had died before the action was joined, you go free because this action has replaced the direct action; but we hold otherwise if you were in delay in dealing with this action. 5. An action will not be granted to an heir nor against an heir on the ground that his predecessor lied, nor against the predecessor himself because of the [lapse of] time; for it should be open to someone who undertakes the defense of an absent slave to avoid the penalty laid down by this edict, that is, the liability to be sued without the option of noxal surrender. Therefore, if you should deny that the slave is in your power, you can afterward confess that he is, unless the case against you has already proceeded to joinder of issue; for thereafter you cannot be heard, as Labeo says. But Octavenus argues that you can get relief even after joinder of issue for a good reason, such as if your age is such that it is an excuse for you. 6. If a slave is abducted in the absence of his owner (or even from his presence) and in each case it is the same that *restitutio in integrum* is possible, defense to the action is allowed on account of the abducted slave, and the praetor ought to grant the request of those asking for his production in court for the purposes of the defense. The same should be conceded to a usufructuary or to one to whom the slave was pledged as security for a debt in cases where the owner is present but does not wish to defend the action, so that the fraud or malice of one person should not harm another. The same must be shown in the case of a slave in co-ownership if one of the owners is present but does not wish to defend the action. In these cases, the same help must also be given to the plaintiff because it is right that the action is extinguished by the acquisition of ownership; for when he is taken away by the order of the praetor, he becomes the property of the party who took him.

27 GAIUS, *Provincial Edict, book 6:* If action is brought by way of noxal action over a slave who is held by someone as a pledge or over a slave in whom someone else has a usufruct, we must remember that if the creditor or the usufructuary is present but does not wish to undertake his defense, the proconsul will intervene and will prevent any proceedings for realizing the security or on the usufruct. In this case, it can be said tht the security is released (for, indeed, it is no security whatever in respect of which the right of action is denied); but a usufruct, even if action to enforce it is refused, continues as a matter of course until it ends by effluxion of time or by nonuse. 1. From what we have said about a slave whom someone else holds as a pledge, or a *statuliber*, or a slave in whom someone else has a usufruct, it is clear that he who declares on oath that someone else's slave is his, cannot as a matter of course be freed of liability by noxal surrender even though he is liable to a noxal action; because they cannot transfer ownership to the plaintiff who are not owners themselves. It is true, however, that if a slave is handed over in this way and his owner later brings a *vindicatio* but does not offer to pay damages as calculated, he can be met by the defense of fraud.

28 AFRICANUS, *Questions, book 6:* And in general, if I sue you in a noxal action over someone else's slave who is serving you in [supposed] lawful slavery and you noxally surrender him to me and if his owner brings a *vindicatio* against me when I am in possession of him, I can defeat him by the defense of fraud unless he offers to pay the damages as set. But if the owner himself is in possession the *actio Publiciana* is granted to me and if the defendant raises the defense "unless the defendant is owner," I shall have a good answer of fraud in my favor. Following this principle, I can acquire ownership by right of use, even though I knowingly possess another's property. Indeed, if the law were laid down otherwise, it would happen that a *bona fide possessor* would suffer a great injustice if, whereas according to the law a noxal action would lie against him, the necessity were laid upon him of having to pay the damages as calculated. And the same must also be said if I take a slave away on the praetor's order from an owner who did not defend him, because in that case also I have a lawful cause for possession.

29 GAIUS, *Provincial Edict, book 6:* It is not only he who does not have a slave in his power who can decline the noxal action, but even he who does have him in his power is free to avoid the action if he leaves that particular person undefended; but in this case, he must transfer his rights to the plaintiff, just as if he had lost the case.

30 GAIUS, *Urban Praetor's Edict concerning Anticipated Damage:* In noxal actions, the rights of those who are absent in good faith are not affected, but when they return, the right to enter a defense is given to them on principles of fairness and equity whether they are owners or whether they have some rights in the property in question, such as a creditor or a usufructuary.

31 PAUL, *Plautius, book 7:* With regard to the praetor's statement that, when a gang of slaves commits theft, he will grant an action such that, whatever the plaintiff sues for, he will get as much as if a freeman had committed the offense, the question has been asked whether this relates to the payment of pecuniary damages or whether it includes noxal surrender, so that, for example, if double damages are made up in the values of the slaves who are noxally surrendered, any further rights of action are lost. Sabinus and Cassius think that the price of those noxally surrendered ought to be taken into account, as Pomponius thinks, and that is correct. Indeed, even if a slave is taken off undefended, his value is to be taken into account. Certainly, Julian holds that it is not only the double damages but also the value recoverable by *condictio* that must be considered. The time when the theft was committed must be looked at to see whether the slaves were of the same gang; for the edict does not apply if they belonged to different masters and later came into the ownership of one.

32 CALLISTRATUS, *Monitory Edict, book 2:* If a slave in the power of someone other than his owner is alleged to have committed an offense, he is taken off if he is not defended; and if his owner is present, he should hand him over and give an undertaking against fraud.

33 POMPONIUS, *Sabinus, book 14:* No one can be compelled against his will to defend anyone else in a noxal action, but if it is his slave, he must go without him if he does not defend him. But if the person in his power is a freeman, he is granted without question the right to conduct his own defense.

34 JULIAN, *Urseius Ferox, book 4:* For whenever no one defends a son-in-power in the case of delict, the action is granted against the son himself.

35 ULPIAN, *Sabinus, book 41:* And if judgment is given against him, the son must discharge it himself; for the decision is binding on him. Moreover, this must also be said, that his father can be sued up to the extent of his *peculium*, but only after judgment has been given against the son.

36 ULPIAN, *Edict, book 37:* If a slave is pledged for a debt and then stolen back by the debtor and someone buys him from the debtor, he will be liable on account of the slave for theft once he has acquired ownership of the slave; nor does he escape liability because the slave can be recovered from him by the Servian action. And it is the same if someone buys from a vendor aged less than twenty-five years or knowingly in fraud of creditors. Although such persons may have ownership taken away from them, they can be sued in the meanwhile.

37 TRYPHONINUS, *Disputations, book 15:* If someone else's slave commits theft against me and later he comes into my ownership, the right of action for theft which was available to me is extinguished if it has not yet proceeded to joinder of issue; nor if I should subsequently dispose of a slave whom I bought before joinder of issue will the action for theft be revived. But if I bought him after joinder of issue, the vendor will be liable to pay,

38 ULPIAN, *Edict, book 37:* just as he would if he had sold him to someone else. Indeed, it matters little to whom he sells him, whether it is to the plaintiff or anyone else, and it is his own fault that he will have to bear the damages, because by selling him he put it beyond his power to surrender him noxally. 1. Julian, however, writes in the twenty-second book of his *Digest* that if I abandon a slave who committed theft against you, I free myself from liability because he at once ceased to belong to me, so that there cannot be an action of theft on account of a slave without an owner. 2. If my slave steals your property and sells it and you take by force money which he had as part of the price, an action of theft will lie on both sides, for you can sue for theft on account of the slave's wrongdoing, and I can sue you in respect of the money. 3. Furthermore, if I pay money to my creditor's slave for him to give it to his master, there is equally ground for an action of theft if he embezzles the money so received.

39 JULIAN, *Digest, book 9:* If a slave belonging to several owners commits theft and all the owners resort to fraud to avoid having him in their power, the praetor ought to follow the action of the civil law and grant the praetorian action which he provides in such cases against whichever defendant the plaintiff chooses; but he should not show any more favor to the plaintiff than allowing him to bring an action without the option of noxal surrender against whomever he would have been able to sue in a noxal action if the slave had been produced in court. 1. He who confesses that someone else's slave is his should nevertheless be compelled to give security if good cause is shown, even though he is liable to a noxal action; but he who is sued on account of his own slave should not be burdened by security, for he is not offering himself as defendant on behalf of someone else's slave. 2. If someone alleges that the owner of a slave has by fraud contrived not to have his slave in his power and the owner contends that his slave should be defended by someone else with security given, this is a case for a defense of fraud. 3. But if after issue is joined with the owner and thereafter the slave makes an appearance and is carried off because he was not defended, the owner will be discharged if he establishes a defense of fraud. 4. But if the slave dies before joinder of issue, the owner will in no way be liable in this action.

40 JULIAN, *Digest, book 22:* If a slave left as a legacy should steal from the future heir before he entered into his inheritance, the heir can bring an action of theft against the legatee if he accepts the legacy; but if the same slave stole something which was part of the inheritance, the action for theft will not lie because there can be no theft of things of this nature, though the action for production can be brought.

41 JULIAN, *Urseius Ferox, book 2:* When a slave held in common by two owners causes damage to one of them, there is no Aquilian action on that account, because if he had done the damage to a third party, he could have sued the other co-owner under the *lex Aquilia* for the whole amount, just as when a slave owned in common commits theft, one owner cannot bring an action for theft against the other; but he can bring an action for dividing common property.

42 ULPIAN, *Edict, book 37:* If a man on whose account issue has been joined in a noxal action claims his freedom, the action should be stayed until judgment is given on his status; and accordingly, if he is pronounced slave, the noxal action will proceed, but if he is pronounced free, that action will appear to be pointless. 1. If someone defends a noxal action on account of a dead slave in ignorance of his death, he should go free because it has ceased to be right that he should hand over anything on his account. 2. These actions are available indefinitely and can be brought as long as we have power of surrendering the slave. Nor are they available only to us but also for our successors and also against the defendant's successors, not because they are successors as such, but on account of their ownership in the eyes of the law. On the same principle, if the slave shall have passed to another owner, that new owner can be sued in a noxal action on account of his ownership.

43 POMPONIUS, *Letters, book 8:* Slaves, in whose case the liability for damage attaches to them personally, must be defended at the place where they are alleged to have committed the delict. Therefore, their owner must produce them at that same place where they are said to have committed the violent act; and he is liable to lose all his property in them if he does not defend them.

BOOK TEN

1

THE ACTION FOR REGULATING BOUNDARIES

1 PAUL, *Edict, book 23:* The action for regulating boundaries is a personal action, although its purpose is *vindicatio* of a thing.

2 ULPIAN, *Edict, book 19:* This action is concerned with rural estates, even if buildings come between them; for it makes little difference whether someone puts trees or a building on the boundary. 1. When the judge appointed to regulate boundaries is unable to settle the boundaries, he is allowed to settle the dispute by adjudication. And if, in order to eliminate long-standing uncertainty, the judge should wish to redraw the boundary line in a different place, he can do this by adjudication and condemnation.

3 GAIUS, *Provincial Edict, book 7:* In that case, some of one man's land has to be adjudicated to the other, and on that account the beneficiary of the adjudication should be condemned to pay a specified sum of money in return for what is adjudicated to him.

4 PAUL, *Edict, book 23:* Furthermore, in a dispute over a single piece of land, the property can be divided into sections by adjudications, according to what the judge establishes about each party's title to the land in question. 1. In the action for regulating boundaries, one also takes account of any advantage. For what if someone has derived some benefit from a piece of land which, as it turns out, belongs to his neighbor? It is not unfair for him to be condemned on that account. Also, if a surveyor has been hired by one party only, the other, who did not hire him, should be condemned to pay part of the fee. 2. Fruits are also taken into account in this action if they were received after joinder of issue; for then fault and fraud are evident. But fruits received before the action are not necessarily taken into account; for either the person received them in good faith and should have the benefit if he has consumed them, or he received after joinder of issue; for then fault and fraud are evident. But fruits received before the action are not necessarily taken into account; for either the person re- or to pull down a building or part of one, which is built on the boundary, then he should be condemned. 4. If it is alleged that boundary marks have been knocked down or plowed over, the judge dealing with that offense can also deal with the boundaries. 5. If one farm is owned by two men, the other by three, the judge can adjudicate the

disputed land to one side, even though the farm has more than one owner, because the land is held to be adjudicated to the farm rather than to the persons; but in such cases, where an adjudication is in favor of several people, each one receives a share proportionate to his share of the original farm. 6. Joint owners of an undivided common farm cannot be condemned in each other's favor; for it is held that they cannot have an action against one another. 7. If you and I own a common farm and I alone own a neighboring one, can we be given an action for regulating boundaries? Pomponius writes that we cannot, because my partner and I cannot be opponents in this action, but are regarded as a single person. Pomponius also says that we should not even be given an *actio utilis*, since the man with his own farm can dispose of either the common farm or his own one and then go to law. 8. Moreover, there can be an action for regulating boundaries not just between two farms, but also between three or more; for suppose several farms, perhaps three or four, all share a common boundary. 9. The action for regulating boundaries is also available in the case of a long lease of public land, and it is available between usufructuaries or between a usufructuary and the owner of bare title to a neighboring farm and between those who have possession by virtue of a pledge. 10. This action applies to the boundaries of rural land; for it has not been thought applicable to boundaries between urban land, since there one talks of "neighbors" rather than "people with a common boundary," and urban properties are generally separated by common walls. For this reason, if buildings are joined together, even in the country, this action does not apply; and in the city there may be extensive gardens, so making possible an action for regulating common boundaries. 11. If a river or public road intervenes, this is not classed as a common boundary, and so there cannot be an action for regulating boundaries,

5 PAUL, *Sabinus, book 15:* because the public road or river rather than my neighbor's land shares the boundary with my land.

6 PAUL, *Edict, book 23:* But if a private stream intervenes, the action for regulating boundaries lies.

7 MODESTINUS, *Encyclopaedia, book 11:* Arbitrators are appointed to establish the area of the land, and anybody who is stated to have more land than he ought to in the territory is compelled to hand it over to those who possess less than they ought to, so that they recover their full share. This is laid down in a rescript.

8 ULPIAN, *Opinions, book 6:* If a river bursts its banks and the flood water obscures the boundaries, so that some people have the opportunity to seize land to which they have no right, then the provincial governor gives orders that they should keep out of land which does not belong to them, that owners should have their land restored, and that the boundary marks should be indicated by a surveyor. 1. The duties of the judge in a boundary dispute include sending surveyors and settling the question of the boundaries in an equitable manner with their help; if circumstances demand, he should inspect the land himself.

9 JULIAN, *Digest, book 8:* An action for regulating boundaries can still go ahead even if partners have had an action for dividing common property or have disposed of the farm.

10 JULIAN, *Digest, book 51:* The actions for dividing common property, for dividing an inheritance, and for regulating boundaries are such that in them the individual participants have the double legal status of plaintiff and defendant.

11 PAPINIAN, *Replies, book 2:* In boundary disputes, when there are no old records, one should follow the authority of the last census before the commencement of the action, as long as there is no evidence that the boundaries have since been altered by additions or subtractions of land, through various successions or through the actions of possessors.

12 PAUL, *Replies, book 3:* As regards the question of ownership, one should recognize those boundaries which were pointed out by the owner of both farms when he sold one of them; for it is not the boundary marks which used to separate the two farms that should be recognized; on the contrary, the pointing out of neighboring properties creates new boundaries between the farms.

13 GAIUS, *XII Tables, book 4:* We must remember that in the action for regulating boundaries we should observe the rule which was formulated roughly on the model of the law which Solon is said to have passed at Athens; there it is stated: "If a man builds a dry stone wall next to someone else's land, he should not cross the boundary; if he builds a proper wall, he should leave a gap of one foot; if a building, two feet; if he digs a grave or pit, he should leave a gap equal to the depth; if a well, a gap of one fathom; he should plant an olive tree or fig tree nine feet away from the other man's land, other trees five feet away."

2

THE ACTION FOR DIVIDING AN INHERITANCE

1 GAIUS, *Provincial Edict, book 7:* This action is derived from the *Law of the Twelve Tables*; for when co-heirs wished to dissolve their common ownership it seemed necessary to establish some action by which the inherited property could be distributed among them. 1. A man who does not have possession of his share still has a direct legal right to this action. But if the person who has possession denies that the other is his co-heir, he can debar him from the action with this defense, "if the question of the inheritance is not prejudged by the matter at issue." But if the man has possession of his share, even if it is denied that he is co-heir, such a defense does not debar him. Consequently, in this case, the same judge who is hearing the action determines whether the man is co-heir; for unless he is, nothing should be adjudicated to him, nor should his opponent be condemned to pay him anything.

2 ULPIAN, *Edict, book 19:* The action for dividing an inheritance is used to divide up an inheritance, whether testamentary or by intestacy, whether it is passed on by the *Law of the Twelve Tables* or some other law or by *senatus consultum* or even by *constitutio*; and in general, those whose inheritance can be the subject of a claim are the only people whose inheritance can be divided. 1. If a quarter share is passed on to a man who has been adopted by *adrogatio* under the *constitutio* of the deified Pius, since he neither becomes heir nor acquires *bonorum possessio*, an *actio utilis* for dividing an inheritance is required. 2. Again, in the case of the *peculium* of a son-in-power who was a soldier, there are strong grounds for maintaining that the inheritance has been created by *constitutio*, and so this action applies. 3. In the action for dividing an inheritance, each of the heirs plays the role of both defendant and plaintiff. 4. Moreover, there is no reason to doubt that an action for dividing an inheritance can be allowed between fewer than the total number of heirs. 5. Although debts are not taken into account in this action, still, if stipulations have been made about the division of the debts to the effect that the heirs should abide by this division and that one heir should delegate any actions to another and appoint him procurator over his own affairs, then in such a case they should abide by the division.

3 GAIUS, *Provincial Edict, book 7:* Obviously, the judge's duties sometimes include distributing the debts and credits, without division, among the individual co-heirs, since often both the discharge of and claim to part of a debt causes considerable inconvenience. But, of course, this distribution does not mean that any one individual owes or is owed the whole amount; rather it means that if an action has to be brought, he brings it partly on his own account, partly as procurator, or if an action has to be defended, he is sued partly on his own account, partly as procurator. For although the creditors retain the right to go to law against the individual co-heirs, the co-heirs also have the right to appoint as their representatives those to whom the liabilities incurred in this action have been transferred by the judge, acting in virtue of his official powers.

4 ULPIAN, *Edict, book 19:* So everything apart from debts is taken into account in this action. But if a debt has been left as a legacy to one of the heirs, he receives it in an action for dividing an inheritance. 1. Harmful drugs and poisons are covered by this action, but the judge should not get involved with them; for he ought to discharge the responsibilities of a good, honest man. The same goes for his treatment of books on unacceptable subjects, on magic, perhaps, or anything of that sort. All such things should be destroyed at once. 2. Also, if something has been acquired by embezzlement, sacrilege, or force, either by robbery or by assault, it should not be divided. 3. Furthermore, the judge should order either that the tablets of the will should remain with the heir to the largest share or else that they should be deposited in a temple. For Labeo writes that when an inheritance is sold, a copy of the tablets of the will should be deposited; for the heir should hand over a copy, but keep the original himself or else deposit it in a temple.

5 GAIUS, *Provincial Edict, book 7:* If there are any *cautiones* in the inheritance, the judge should ensure that they remain with the person who is heir to the largest share; the other heirs are to have them copied and authenticated, a *cautio* being given that when circumstances require, the originals will be produced. If all are heir to the same share and cannot agree who should keep the *cautiones*, they should draw lots; or they

should choose, by consent or by a vote, some friend with whom they may be deposited; or the *cautiones* should be deposited in a sacred temple.

6 ULPIAN, *Edict, book 19:* For I do not think nor does Pomponius that one should hold an auction with the highest bidder keeping the documents relating to the inheritance.

7 VENULEIUS, *Stipulations, book 7:* Suppose a co-heir is appointed subject to a condition or is in enemy hands, and the other heir claims that he is heir, brings an action to support his claim, and wins it; but later the condition is fulfilled or the co-heir returns by *postliminium.* Ought the other heir to share the benefits of his victory with him? For without doubt an action on the judgment for the full amount is available to him. The co-heir should be given a choice; that is to say, either the benefits should be shared or the heir who has qualified as heir or has returned to his city since his co-heir's victory should be given the opportunity to go to law. The same rule is to be followed if a posthumous son is born subsequently. For such people should not be accused of failing to claim earlier, seeing that they have only qualified for the inheritance after their co-heir's victory.

8 ULPIAN, *Edict, book 19:* Pomponius writes that if accounts are left to one of the heirs as a *praelegatum*, they should not be handed over to him until his co-heirs have copied them. Also, he says, if a slave-steward is left as a legacy, he should not be handed over until he has surrendered the accounts. We must consider whether, in addition, a *cautio* should be given to the effect that whenever required, access will be granted to the accounts or to the steward left as a *praelegatum.* For often the original accounts are necessary, or the steward is needed to deal with matters subsequently coming to light which relate to what he knows. In fact, it is necessary for the heir in question to give such a *cautio* to his co-heirs. 6. Pomponius also says that pigeons which are used to being let out of their pigeon loft are included in the action for dividing an inheritance, since they are our property so long as they are in the habit of returning to us. So if someone appropriates them, the action for theft is available to us. The same is said of bees, because they are reckoned to be part of our property. 2. Pomponius also thinks that if any of our livestock is carried off by a wild beast, it is included in the action for dividing an inheritance if it escapes from the beast; for, he says, the better view is that anything carried off by a wolf or other wild beast does not cease to be our property so long as it has not been eaten by the beast.

9 PAUL, *Edict, book 23:* Things which were delivered to the deceased and have been acquired by usucapion by the heirs are covered by this action; so are things which were bought by the deceased and have been delivered to the heirs;

10 ULPIAN, *Edict, book 19:* so is land which is in our ownership and also public land subject to a long lease and land subject to the right of *superficies*; so equally are things which the deceased possessed in good faith, though they did not belong to him.

11 PAUL, *Edict, book 23:* Furthermore, offspring born after acceptance of the inheritance

12 ULPIAN, *Edict, book 19:* and even after joinder of issue are covered by the action for dividing an inheritance and can be adjudicated, as Sabinus writes. 1. The same goes for anything which has been given by an outsider to slaves who belong to the

inheritance. 2. Anything left as a conditional legacy belongs to the heirs in the interim; it is included in the action for dividing an inheritance and can be adjudicated—along with its accessories, of course—so that if the condition is fulfilled, the thing is taken from the person to whom it has been adjudicated, or if the condition fails, it returns to the heirs to whom it was charged. The same rule is applied to a *statuliber*, who in the interim belongs to the heirs, but when the condition is fulfilled, he should gain his freedom.

13 PAPINIAN, *Questions, book 7:* For the only alienations which are forbidden after joinder of issue are voluntary ones, not those for which there is a long-established reason and a binding legal requirement.

14 ULPIAN, *Edict, book 19:* But if usucapion is commenced before joinder of issue by a person who is not an heir and subsequently it is completed, that removes the thing from the scope of the action. 1. Can usufruct be included in this action? Suppose, for example, that a farm has been left without the usufruct as a legacy charged to the heirs,

15 PAUL, *Edict, book 23:* or that a usufruct has been left as a legacy to a slave who belongs to the inheritance. For a usufruct cannot be transferred from a person without being extinguished.

16 ULPIAN, *Edict, book 19:* And I think the judge's duties include compliance with the heirs if they wish to withdraw from common ownership of a usufruct; but he should see that *cautiones* are given. 1. Julian says that if the judge adjudicates a farm to one man and the usufruct of the farm to another, the usufruct is not shared. 2. Usufruct can be adjudicated with effect from a certain date or until a certain date and for alternate years. 3. Any alluvial deposit which a river adds to land after joinder of issue is also covered by this action. 4. However, if a usufruct is affected in any way by the fraud or fault of one of the heirs, Pomponius says that this too is taken into account in the action; for, in fact, whenever anyone acts fraudulently or is at fault, when he does something in connection with an inheritance, this is covered by the action for dividing an inheritance, as long as he does it as an heir. So if one of the heirs made off with money while the testator was alive, the money falls outside the scope of the action for dividing an inheritance, because the offender was not yet heir at the time. But when he did act as an heir, even if he can be sued by some other action as well, Julian writes that he is still liable to the action for dividing an inheritance. 5. Finally, he says that if one of the heirs erases or falsifies the accounts relating to the inheritance, he is liable under the *lex Aquilia* on the grounds that he has ruined them; but he is no less liable to an action for dividing an inheritance. 6. Again, if a slave belonging to the inheritance steals something belonging to one of the heirs, Ofilius says that the action for dividing an inheritance is available and that the actions for dividing common property and for theft do not apply. So for the plaintiff the result of an action for dividing an inheritance is that either the slave is adjudicated to him or simple damages are assessed and awarded to him.

17 GAIUS, *Provincial Edict, book 7:* When damage has been caused by one of the heirs, the appropriate rule is that there should be an assessment of the simple amount of damages in the action for dividing an inheritance.

18 ULPIAN, *Edict, book 19:* In accordance with this rule, Julian says: Suppose one of several heirs has been left an unspecified slave of his own choice as a legacy, and the heirs allege that Stichus has falsified or ruined the tablets of the will; their purpose in declaring this is that he should not be the slave chosen; but he is subsequently chosen and is the subject of a *vindicatio*; if the other heirs are defendants in the *vindicatio*,

they can use the defense of fraud and have the slave interrogated. 1. But in an action for dividing an inheritance, can the heirs have an interrogation concerning the death of the testator or the death of his wife or children? Pomponius is quite right when he says this has nothing to do with the division of the inherited property. 2. He also says that if a man provides in his will for a slave to be sold for exportation, it is the duty of the judge responsible for dividing the inheritance to see that the wishes of the deceased are not forgotten. Also when the testator has ordered the building of a monument, this can be done through an action for dividing an inheritance. Pomponius, however, suggests that since the matter affects the interests of the heirs who have the right to be buried in the monument [to be built], they can have an *actio praescriptis verbis* for the building of the monument. 3. Under a rescript of the Emperors Severus and Antoninus, when one of the heirs has incurred expenses in good faith, he can recover interest as well from his co-heir, starting from the day payment became due. 4. Celsus also adds discerningly that even if the co-heir has not paid the expenses, he can have an action for dividing an inheritance so that his co-heir may be forced to pay, since the creditor will not release the property in question unless he is paid in full. 5. If a son-in-power who has qualified as part-heir to his father is sued by creditors who have a claim on his *peculium*, and he is prepared to repay everything that is owed, then by using the defense of fraud he can get the creditors to assign their rights of action to himself by mandate; but he can also have an action for dividing an inheritance against his co-heirs. 6. When one of the heirs pays a legacy to a man who has been given *missio in possessionem* in order to protect the legacies, Papinian thinks, and he is right, that the action for dividing an inheritance is available to him against his co-heirs, because the legatee would not have relinquished possession, which he had obtained as a kind of pledge, until the legacy was paid to him in full. 7. Also if someone repays a debt to Titius to prevent a pledge from being sold, Neratius writes that he can bring an action for dividing an inheritance.

19 GAIUS, *Provincial Edict, book 7:* Conversely, the judge should similarly ensure that if one of the heirs has received, or stipulated for, anything at the expense of the inherited property, he is not the only one who profits. The judge, of course, can achieve this either by adding up and comparing their respective gains and losses or by making them give *cautiones* to the effect that gains and losses will be shared between them.

20 ULPIAN, *Edict, book 19:* If a married daughter who ought to have contributed her dowry to her father's estate has given through the error of the co-heirs a *cautio* that she will pay to the heirs—in proportion to their respective shares of the inheritance—whatever she recovers from her husband, Papinian writes that the arbitrator appointed to divide the inheritance should nevertheless rule that even if she dies while the marriage is still in force, the dowry should still be contributed. For, he says, the ignorance of the co-heirs cannot alter the procedure required by the law. 1. If a son-in-power has incurred an obligation on his father's instructions, he should receive the amount of this debt by preferential claim; if he has spent money on his father's interests, the same is held to apply; and if an action on the *peculium* lies, he should receive by preferential claim from the *peculium* the amount which is owing; this is all laid down by our own emperor in a rescript. 2. Furthermore, a son-in-power who is instituted heir receives his wife's dowry by preferential claim; he deserves to, because he himself accepts responsibility for the expenses of the marriage. So he takes the whole dowry by preferential claim and gives a *cautio* that he will defend the co-heirs who can be sued on the stipulation. The same applies if a stranger gave the dowry and made the stipulation. He gets not only his own wife's dowry but also his son's wife's on the grounds that the expenses of this marriage too are his concern, since he himself must necessarily accept responsibility for the expenses of his son and daughter-in-law. Marcellus writes that the son should take the dowry by preferential claim not only if it was given to the father but also if it was given to himself; in the latter case, with the

proviso that the dowry must be covered by the *peculium* or else it must have benefited his father's estate. 3. If a father has divided his estate among his sons without putting anything in writing and has distributed his liabilities for debt among them according to the size of their possessions, Papinian says this is not regarded as a simple gift, but rather as a division under the father's last will. Clearly, he says, if the creditors sue each of the sons in proportion to his share of the inheritance, and one of them refuses to abide by the conditions agreed, they can bring an *actio praescriptis verbis* against him as though they had made an exchange [with him] on fixed terms, provided, of course, that all the property is included in the division. 4. The action for dividing an inheritance cannot be brought more than once unless good reason is established; though if some things were left undivided, an action for dividing common property can deal with them. 5. Papinian says that if the burden of a debt is imposed on one of the heirs, otherwise than as a legacy, it is the duty of the judge hearing the action for dividing an inheritance to see that he takes responsibility for the debt (but his liability should not exceed three quarters of his share, so that he has one quarter intact); accordingly, he should give a *cautio* that he will not let his co-heirs suffer any loss. 6. Papinian also writes that if a son is in debt because of public *munera* for which he had his father's consent, and if he is named as part-heir in the will, he should also get the amount of this debt by preferential claim, because this too was his father's debt. But if he undertook any *munera* after his father's death, his father's heirs are free from liability for them. 7. But Neratius gave the following opinion. A man with several sons promised that one of them would undertake to stage public games, and before the son had discharged this function, the father died, having instituted all his sons as heirs. The question was: Could the son recover his expenses on the project by an action for dividing an inheritance? Neratius's opinion was that he could not recover them by any action. This view is rightly rejected, so the matter should be covered by the action for dividing an inheritance. 8. Again, Papinian writes that if a husband instructs one of his two heirs to take the responsibility for repaying a dowry which is the subject of a stipulation and if the wife sues both heirs for the dowry, then the heir instructed to take the responsibility must defend his co-heir. But if legacies, charged to both heirs, have been left in lieu of the dowry and if they are retained because the widow chooses to take the dowry itself, they ought not to benefit the co-heir who is free from responsibility for the debt [repayment of the dowry]; the intention is obviously that the judge in the exercise of his office should award to the co-heir who has taken responsibility for the debt the legacy [charged on the other]. This is the case unless the testator has instructed otherwise. 9. Papinian also writes that if a *statuliber* pays something from his *peculium* to one of the co-heirs in order to fulfill the condition on which he becomes free, that is not taken into account in this action and does not have to be shared.

21 PAUL, *Edict, book 23:* The same applies in the action for dividing common property.

22 ULPIAN, *Edict, book 19:* Again, Labeo writes that if one of the heirs digs up a treasure which was left there by the testator, he is liable to the action for dividing an inheritance, even if he has shared the treasure with an outside accomplice. 1. In an action for dividing an inheritance, the judge can only adjudicate the same thing to several people if a preferential claim to a single thing is left to several people (in which case Pomponius writes that there is no alternative but to adjudicate it to several people), or if the judge assigns a definite share of the thing to each of the heirs. But the judge can also allow an auction and adjudicate the thing to one of the heirs. 2. Nobody questions that a farm can be divided into sections and adjudicated section by section. 3. Also, as the judge adjudicates, he can impose some servitude, for example, making one of the sections he adjudicates serve another; but if he adjudicates one piece of land unconditionally to one person, he can no longer impose a servitude on it when he adjudicates another piece of land. 4. The action for dividing an inheritance

is concerned with two kinds of thing, namely, property, and liabilities for payments (or transfers), the latter giving rise to personal actions. 5. As regards property which is in enemy hands, Papinian criticizes Marcellus for thinking that transfers of property which is in enemy hands are not covered by the action for dividing an inheritance. For what is to prevent transfer of the property being so covered when the property itself also is,

23 PAUL, *Edict, book 23:* because of the prospect of *postliminium*? Of course, a *cautio* must be given, to cover the situation in which they are unable to return, unless it is only the uncertain chance of a favorable outcome which is given a valuation.

24 ULPIAN, *Edict, book 19:* Moreover, transfers of a thing which has ceased to exist are also covered by the action; here I agree with Papinian. 1. The action for dividing an inheritance also lies between those with *bonorum possessio* and between a man to whom inheritance has been handed over under the *senatus consultum Trebellianum* and the other praetorian successors.

25 PAUL, *Edict, book 23:* The heirs of a man who has died in enemy hands can have this action. 1. If a soldier has made one man heir to his military belongings and another man heir to his other belongings, the action for dividing an inheritance does not lie; for the estate has been divided between them in accordance with the relevant *constitutiones*, just as the action for dividing an inheritance fails when the estate contains no corporeal property but only debts owing to it. 2. As far as having an action for dividing an inheritance is concerned, it makes no difference whether someone has possession of the inheritance or not. 3. Where several inheritances are held in common by the same people in virtue of different titles, a single action for dividing an inheritance can be had to deal with them. 4. If Titius's inheritance is held in common by you and me, and Seius's is held in common by you, me, and Titius, Pomponius writes that the three of us can have a single action. 5. Again, if several inheritances are held in common by us, we can have an action for dividing an inheritance in respect of just one of them. 6. If the testator owned something in common with an outsider or if he left a share of one of his own possessions to someone as a legacy or if, before joinder of issue in an action for dividing an inheritance, an heir disposed of his own share, it is the judge's duty to order that the share which belonged to the testator be handed over to somebody. 7. Pomponius says that if a co-heir has possession of something as purchaser or, say, as recipient of a gift, it is not covered by the action for dividing an inheritance. 8. He also writes: suppose you and I have qualified as heirs to Titius; you sue Sempronius, claiming from him a share of a farm and alleging that the whole farm belongs to the inheritance; but you are defeated; soon afterward I buy the same share from Sempronius, and it is delivered to me; if you bring an action for dividing an inheritance, not only will what I possess as heir not be covered by the action, but neither will what I possess as purchaser; for since the earlier judge found that the whole farm does not belong to the inheritance, how can it be covered by the action for dividing an inheritance? 9. It is doubted whether this action covers a stipulation under which the individual heirs each have an action for the full amount, for instance, if a man has died after stipulating for right of way in person or with cattle; for according to the *Law of the Twelve Tables*, such a stipulation may not be divided, because it cannot be. However, the better view is that the stipulation is not covered by the action, but an action for the full amount is available to all of them, and if right of way is refused,

condemnation should be given in proportion to the plaintiff's share of the inheritance. 10. On the other hand, if a man who promised right of way has died, instituting several heirs, the obligation is not divided, and undoubtedly it remains in force, since even a man who does not have any farm can promise right of way. So since they are individually liable in full, the judge should ensure that they give *cautiones* to the effect that if one of them is sued and pays the amount of damages assessed, he may recover the appropriate proportion from the others. 11. The same rule also applies if the testator leaves a right of way as a legacy. 12. If the testator has promised that "neither he nor his heir will deny right of way in person or with cattle," in the case of this stipulation as well the interests of the co-heirs are to be safeguarded by a provision that the act of one of them will not be allowed to harm the others; for if one of them denies right of way, the stipulation becomes actionable in full. 13. The same legal rule applies to money promised by the testator, if a penalty is attached to the promise; for although under the *Law of the Twelve Tables*, such an obligation may be divided, still paying one's own share does not help one to escape the penalty. So if, on the one hand, the money has not yet been paid and has not fallen due, then as a safeguard, everyone must give a *cautio*, guaranteeing that if through his own fault the sum is not paid in full, the others will not suffer, or that he will pay his share to the person who pays the full amount; but if, on the other hand, in order to stop the penalty coming into operation, one of the heirs has already paid the whole sum promised by the deceased, then he can recover their respective shares from his co-heirs by the action for dividing an inheritance. 14. The same procedure is followed in connection with the redemption of pledges; for unless the whole amount owed is handed over, the creditor can lawfully sell the pledge. 15. If one of the co-heirs defends a slave belonging to the inheritance in a noxal action and pays the damages assessed, that being the best course, then he may recover a proportion of the money by this action. The same applies if one co-heir gave a *cautio* regarding the legacies, in order to prevent the legatees from being given *missio in possessionem*. And in general, if one heir, when circumstances make it necessary, performs completely some act which cannot be performed in part, then the action for dividing an inheritance lies. 16. A co-heir must answer not only for fraud but also for any fault in his handling of the inherited property, for we do not contract with a co-heir, but just happen to get involved with him. However, a co-heir has no obligation to take the same degree of care as a careful head of the household, since he has good grounds for acting by virtue of having his own share, and consequently the action for unauthorized administration is not available to him. He, therefore, ought to take the same degree of care as he takes over his own affairs. The position is the same if a thing is left as a legacy to two people; for it is not their agreement, but circumstances, that have bound them together in partnership. 17. If an unspecified slave is left as a legacy, but the legatee subsequently dies and one of his heirs by withholding his consent blocks the legacy, then by means of this action, that heir can be condemned to pay the others the sum they have lost. The same applies if, conversely, a legacy of an unspecified slave of their own choice is charged upon the heirs, but one of them will not agree to the delivery of a slave whom it was in everyone's interests to hand over, with the consequence that the heirs are sued by the legatee and condemned by the court to pay an additional sum. 18. Again, a man is liable for fault if, having himself accepted the inheritance before the other heirs did, he has allowed the servitudes owed to the inherited lands to be extinguished through disuse. 19. If a son was condemned when defending his father and paid either during his father's lifetime or after his death, the fairest view to take is that he can claim the money from his co-heir in an action for dividing an inheritance. 20. In an action for

dividing an inheritance, the judge ought to leave nothing undivided. 21. Again, he ought to ensure that those to whom he makes adjudications are given a *cautio* about eviction. 22. If money which has not been left in the deceased's house is left by preferential claim, it is disputed whether the co-heirs are liable to provide the full amount or just a share corresponding to their share of the inheritance, as would be the case if the money had been left in the inheritance. The better view is that they ought to pay what would have been paid if the money had been found.

26 GAIUS, *Provincial Edict, book 7:* But the judge's powers allow him to order that one or more items in the inheritance should be sold, and that the money raised from the sale should be paid to the man to whom it has been left as a legacy.

27 PAUL, *Edict, book 23:* In this action, there must be condemnations or acquittals in respect of everyone. So if condemnation is omitted in the case of one party, the judge's decisions are also invalid in respect of the other parties, because in a given action the judgment cannot be partly valid, partly invalid.

28 GAIUS, *Provincial Edict, book 7:* If something which was pledged to a creditor is left by the testator as a legacy by preferential claim, the judge's duties include redeeming the pledge out of common funds and giving the thing to the legatee to whom it is left.

29 PAUL, *Edict, book 23:* If a thing was pledged to the deceased, one should take the view that it is covered by the action for dividing an inheritance. But the person to whom the thing is adjudicated in that action must be condemned to pay his co-heir a proportion of its value; moreover, he does not have to give his co-heir a *cautio* of indemnity against being sued by the person who pledged the thing, because it will be just as if the thing were claimed in an action on *hypotheca* or a Servian action, and damages were assessed and paid, that is to say, a defense will protect the person who has paid the damages against the owner, should he bring a *vindicatio*. On the other hand, if the heir to whom the pledge has been adjudicated wishes to return the whole pledge, he is to be given a hearing, even if the debtor objects. The same cannot be said if the creditor has purchased his co-heir's share of the pledge; for adjudication is compulsory, but purchase is voluntary, unless the creditor is accused of bidding too eagerly. This is all taken into account, because whatever the creditor does should be regarded as done by the debtor through a procurator, and the creditor himself can even raise an action for essential expenses.

30 MODESTINUS, *Replies, book 6:* I have a farm in common with a co-heir who is a *pupilla*. On this farm are buried remains to which veneration is due on the part of both, and in fact the parents of the same *pupilla* are also buried there. But her tutors wish to sell the farm. I do not consent to this, but prefer to retain possession of my share, since I am unable to purchase the whole farm, and wish to perform the requisite religious rites as I please. In order to have the farm shared out, should I apply for an arbitrator to divide common property? Or can an arbitrator appointed to divide an inheritance perform the same function, sharing the possession of this farm between us according to our respective rights but leaving the other items in the inheritance out of account? The opinion of Herennius Modestinus was that there is nothing in the stated situation to prevent the arbitrator appointed in an action for dividing an inheritance from being able to exercise his authority in the division of the farm in question; but religious places are not covered by this action, and each heir has complete rights over them.

31 PAPINIAN, *Questions, book 7:* If a slave who has been assigned as a pledge is redeemed by one of the heirs, even if the slave subsequently dies, the arbitrator still has a duty to deal with him; there are sufficient grounds for this in the common ownership which did exist and would still exist now if the property had not perished.

32 PAPINIAN, *Replies, book 2:* If a father did not divide certain things among his sons after he gave them rights of action by way of division, those things pass to the individual sons in proportion to their shares of the inheritance, provided the things which the father did not divide were not granted to one son under some general description and provided they are not accessories of the things he did give.

33 PAPINIAN, *Replies, book 7:* If the head of a household in leaving pieces of land as legacies to his individual heirs wished to perform the function of an arbitrator making a division, then a co-heir must not be compelled to hand over his share unless he receives in return a share which is free from the ties of a pledge.

34 PAPINIAN, *Replies, book 8:* If the value of slaves is being assessed at the time when the inheritance is divided among the co-heirs, the prevailing view is that they are assigned a value not with a view to purchase but with a view to division. So if they die while a condition attached to them is unfulfilled, they are lost both to the heir and to the *fideicommissarius.*

35 PAPINIAN, *Replies, book 12:* Pomponius Philadelphus gave land as a dowry to his daughter who was in his power, and he gave a mandate for the revenues from the land to be paid to his son-in-law. Someone asked whether the daughter can keep this land, if the man has instituted all his children as heirs. My opinion was that the daughter had good grounds for retaining possession, since her father wished the lands in question to belong to her dowry and the marriage had continued after the father's death; for the daughter had factual possession of the land and was protected by the fact that it formed a dowry which she was entitled to take.

36 PAUL, *Questions, book 2:* In the erroneous belief that you were my co-heir, I have had an action for dividing an inheritance against you, and we have both received adjudications and condemnations from the judge. When the truth is discovered, is *condictio* or *vindicatio* the correct procedure for us? Or does one thing apply to a person who is heir, another to a person who is not? My opinion was: If the sole heir has had an action for dividing an inheritance against Titius in the belief that he was his co-heir and under condemnations then made has paid Titius money, he cannot reclaim the money, since he paid it because it was a judgment-debt. You, however, seem to be swayed by the fact that only co-heirs may join issue in an action for dividing an inheritance. But even though there is no proper action, the fact that someone thinks he has been condemned is sufficient to prevent him from reclaiming the money. If, on the other hand, neither of them was heir, but they joined issue in an action for dividing an inheritance as though they were heirs, then what has just been said about the one man applies to them both, as far as reclaiming the money is concerned. Clearly, if they divided the property without resort to a judge, one can take the view that a *condictio* is available for the property which has passed to the person whom the actual heir believed to be his co-heir; for no transaction is held to have taken place between them, since he only thought the other was his co-heir.

37 SCAEVOLA, *Questions, book 12:* Anyone who brings an action for dividing an inheritance acknowledges that his opponent is his co-heir.

38 PAUL, *Replies, book 3:* Lucius and Titia, brother and sister, were emancipated by their father and when adult received curators, who supplied each of them with the common money which was received from rents. Later they divided the whole estate. After the division, Titia, the sister, began proceedings against her brother Lucius on the grounds that he had received more than she. Since her brother Lucius got no more than his share and in fact got less than half, can Titia have an action against him?

Paul's opinion was that in the stated circumstances, if Lucius has received no more from the revenues of the common land than was due to him according to his share of the inheritance, then no action against him is available to his sister. He gave a similar opinion where the brother was said to have received more than the sister, though no more than half, from maintenance fixed by the praetor.

39 SCAEVOLA, *Replies, book 1:* A man who was instituted part-heir defended and won an action in which the whole inheritance was at stake, an action to which all the heirs were liable on the grounds of their failure to avenge the death of the testator. A co-heir sued him for his share, but refused to pay a share of the expenses incurred in the previous action. The question was: Would the defense of fraud destroy his case? I gave the opinion that if more money had been spent specifically because his case too had been defended in the earlier action, then the expenditure should be taken into account. But even if the defense of fraud is omitted, the defendant can bring an action to recover a share of the expenses. 1. A man who died intestate divided all his land and property between his children by codicils in such a way that he left much more to his son than to his daughter. Ought the sister to contribute her dowry to the estate for her brother's benefit? My opinion was that in the stated circumstances, if the deceased had left nothing undivided, the better view was that his wish was that contribution of the dowry should not be required. 2. A man gave a fifteen-year-old slave freedom "when he is thirty," and indicated that after his own death he wished the slave to receive a food-allowance of ten denarii and a clothing-allowance of twenty-five denarii for the rest of his life. Is the legacy of a food- and clothing-allowance valid, if Stichus dies before the date of gaining his freedom? And if it is not valid, can the heir who has paid the allowances recover anything from his co-heir with whom the slave was living? My opinion was that there was no obligation to pay the allowances, but if what the heir had given had been used up on maintaining the slave, it could not be reclaimed. 3. If a son has contracted debts to the state after his father's death, he cannot charge a share of these debts to his brother in proportion to his share of the inheritance (assuming that they are not partners in everything), not even if they hold their father's inheritance in common and the father before his death held a state magistracy on behalf of the other son. 4. A man named his two sons as heirs in his will and left specified slaves to each of them as a *praelegatum*. One son was left the slave Stephanus with his *peculium*; Stephanus was manumitted and died during the testator's lifetime, then the father died. Do the contents of Stephanus' *peculium* prior to his manumission belong to both sons or only to the one to whom Stephanus with his *peculium* was left as a *praelegatum*? My opinion was that in the stated circumstances it belonged to both. 5. A father divided his possessions between his sons, confirming the division in his will and providing that each of them should have sole responsibility for the debts he had incurred or would incur in future. Later when one of the sons was borrowing money, the father intervened and with his consent the land he had assigned to the son was pledged. After the father's death, the same son had possession of the same land and paid the interest. If the creditor sells the pledged land, is anything to be paid to this son by his co-heir in an action for dividing an inheritance? My opinion was that in the stated circumstances nothing is to be paid.

40 GAIUS, *Fideicommissa, book 2:* If someone who is instituted sole heir has been asked to make some share over to me, for example, a half, the correct procedure is for us to have an *actio utilis* for dividing an inheritance.

41 PAUL, *Decrees, book 1:* A woman appealed against a judge, alleging that when

dividing an inheritance between herself and a co-heir he had divided not only the property but also the freedmen and the maintenance which the testator had ordered to be given to specified freedmen; this the judge had no right to do, she said. From the other side came the reply that they had agreed to the division and for many years had paid the maintenance in accordance with it. It was decided that the arrangements for providing maintenance should stand; but it was added that there could be no division of freedmen.

42 POMPONIUS, *Sabinus, book 6:* If a legacy is left to one of the heirs in these terms, "let him take by preferential claim what he owes me," the duties of the judge appointed to divide the inheritance include ensuring that the co-heirs do not exact payment from him. For even if one heir is ordered to take by preferential claim what is owed by another, it is the judge's duty to grant him actions only in proportion to his share as co-heir.

43 ULPIAN, *Sabinus, book 30:* It is possible for just one of the heirs to apply for an arbitrator to divide an inheritance; for it is common knowledge that just one heir can summon another to court. So even if the other heirs are present and refuse to agree, just one of them can demand an arbitrator.

44 PAUL, *Sabinus, book 6:* There can also be an action for dividing common property between co-heirs, so that only such things as they hold in common, and the issues arising from these things, are included in the action; and their right to have an action for dividing an inheritance in order to deal with everything else remains unimpaired. 1. If there has been an action for dividing an inheritance or for dividing common property, the praetor upholds the adjudications by granting defenses or actions. 2. If the other co-heirs have sold something in the absence of one of their number and have done this fraudulently, in order to get more of the proceeds themselves, they must make amends to the heir who was absent either in an action for dividing an inheritance or in a claim to the inheritance. 3. Julian says that if an heir received fruits from a farm belonging to the inheritance before he accepted the inheritance, these fruits are not paid back in an action for dividing an inheritance, unless the heir knew the farm belonged to the inheritance when he received the fruits. 4. Those who have an action for dividing an inheritance, dividing common property, or regulating boundaries are both plaintiffs and defendants, and so must swear that they are not raising the action vexatiously and are not denying their liability vexatiously. 5. Where one of the co-heirs makes a payment under a heritable stipulation in consequence of his own act, he cannot reclaim anything from his co-heir, for example, if the deceased promised that there would be no fraud on his own part or his heir's part or that neither he nor his heir would deny someone right of way in person or with cattle. Indeed, if the other heirs become liable through the act of one of them, for example, if a condition attaching to a hereditary stipulation is satisfied, they will have an action for dividing an inheritance against the heir through whom the stipulation has become actionable. 6. If someone stipulates that Titius and his heir shall ratify some act and Titius dies leaving several heirs, only an heir who has not ratified is liable; and the only one of the stipulator's heirs who can have an action is the one who has been sued. 7. When a usufruct has been left to a wife as a legacy until such time as her dowry is paid back to her, Cassius says that the arbitrator dividing the inheritance can ensure that an heir recovers any share of the dowry which he has repaid on his co-heir's behalf, and he can also force a co-heir to make repayment; this is correct. 8. If two co-heirs have been ordered to erect a statue and the one does so while the other defaults, Julian says that it is not unjust to grant an action for dividing an inheritance in order that a share of the expenses may be paid under the arbitration of an honorable man.

45 POMPONIUS, *Sabinus, book 13:* If you maintain that something, being in the inheritance, is common to you and me, while I say it is my own, on some other ground, it is not included in the action for dividing an inheritance. 1. Fraud committed by the slave of an heir is not included in the action for dividing an inheritance, unless the owner was at fault in employing an unsuitable slave to deal with common property.

46 PAUL, *Sabinus, book 7:* If a husband is instituted heir by his father subject to a condition, the wife's action on the dowry is suspended in the interim. Obviously, if there is a divorce after the father-in-law's death, even if the condition attached to the son's institution is unfulfilled, one must take the view that this is a case for a preferential claim to the dowry, because when a father dies some things pass to the sons even before they become heirs, for example, obligations in connection with marriage, children, tutelage. So if someone has taken on the expenses of a marriage after his father's death, he should also take the dowry by preferential claim; this view was also taken by my teacher Scaevola.

47 POMPONIUS, *Sabinus, book 21:* In an action for dividing an inheritance or for dividing common property, if, while the case is under arbitration, there is a dispute about a praedial servitude, it is established that all those between whom the arbitrator has been appointed can both bring actions and issue a notice banning new building work according to their respective shares; and when adjudications are made by the arbitrator, if the whole farm is adjudicated to one man, *cautiones* should be given that the proceeds of these actions will be given to him, or any expenditure incurred in them will be reimbursed; and if there was no action on that count while the case was under judgment, the person to whom the whole farm is adjudicated has the sole right of action, or else his right is in proportion to the share adjudicated to him. 1. Again, if movable property which is covered by these actions should be stolen while the actions are in progress, those who bore the risk attached to the property can have an action for theft.

48 PAUL, *Sabinus, book 12:* When an action has been brought for dividing an inheritance or for dividing common property or for regulating boundaries, if one of the litigants dies, leaving several heirs, the action cannot be divided up. Either all the heirs must accept the action, or they must appoint someone as procurator to represent them all in the action.

49 ULPIAN, *Disputations, book 2:* A man who was instituted part-heir was ordered by the praetor to bury the testator, so he sold a slave who was granted his freedom in the will, giving a stipulatory promise of twice the value [in the event of eviction]. He was sued on this *cautio* and paid. By means of an action for dividing an inheritance, can he get what he lost through his stipulation for double the value? First, let us consider whether he ought to have given a *cautio* for double the value. In my view, he had no obligation to; for only those who sell of their own accord are compelled to give a *cautio* for double the value; but if the seller is doing his duty, he should not be forced to, no more than if the seller is someone who has been appointed by the praetor to carry out a judgment; for he too is in a position where he should not be compelled in the same way as those who sell of their own free will. For there is a big difference between those who are carrying out their duty and those who are selling of their own free will. So the person was not obliged to give a stipulation for double the value in the first place; but if the thing which was sold is reclaimed by someone, the praetor should declare that the purchaser has an action on sale against the person who has qualified as heir. If, on the

other hand, the heir has made a mistake and given the *cautio* and the slave has won his freedom, the stipulation becomes actionable. If it does, it is only fair for the heir to be given an *actio utilis* against his co-heir (since a direct action for dividing an inheritance is not available), to prevent him from suffering lasting loss. For to qualify for an action for dividing an inheritance, a man must not only be an heir, but he must sue or be sued on some act performed or some misdeed committed after he became heir; otherwise, the action for dividing an inheritance fails. And so if someone did something in connection with the inheritance before he knew that he was heir, the action for dividing an inheritance does not lie, because it appears that it was not his intention to act as heir. Thus, anyone who did something (for example, buried the testator) before accepting the inheritance cannot have an action for dividing an inheritance; but if he did it after accepting the inheritance, we shall accordingly say he can recover his expenditure on the funeral by an action for dividing an inheritance.

50 ULPIAN, *Opinions, book 6:* If a father provided an allowance for his emancipated son while he was living abroad in pursuit of his studies and if it is proved that the father did not intend this to be a loan when he sent it, but was influenced by natural affection, then in all justice the allowance cannot be taken into account when one is reckoning what share of the deceased's property has passed to the son.

51 JULIAN, *Digest, book 8:* If a farm was delivered to a father-in-law by way of a dowry and the father-in-law instituted his son heir to a certain share, then the arbitrator dividing the inheritance should see that the son takes the farm by preferential claim, so that his position is the same as it would have been had the dowry been left to him as a legacy by preferential claim. So fruits received after joinder of issue should go to him, when expenses have been taken into account, but fruits received before joinder of issue belong to all the heirs equally. Expenses should be taken into account, because no circumstance can arise to prevent their being deducted. 1. If I would like to bring a claim to the inheritance against you, but you would like us to have an action for dividing an inheritance, both our wishes must be satisfied, if there is good reason. For if I have possession of the whole inheritance and I acknowledge that you are heir to a half, but I wish to dissolve our common ownership, I should be granted an action for dividing an inheritance, because the inheritance cannot otherwise be divided between us. Likewise, if you have good reason for wanting to settle the business by a claim to the inheritance rather than by an action for dividing an inheritance, you must also be allowed to bring a claim to the inheritance; for some matters are covered by a claim to the inheritance which are not brought into an action for dividing an inheritance; for instance, if I am in debt to the inheritance, you will not recover what I owed the deceased by an action for dividing an inheritance, but you will recover it by a claim to the inheritance.

52 JULIAN, *Urseius Ferox, book 2:* Maevius who has made us his heirs owned some property in common with Attius. If we have had an action for dividing common property against Attius and that property has been adjudicated to us, Proculus says it will be covered by the action for dividing an inheritance. 1. In an action for dividing an inheritance, a slave who has been declared free and an heir must hand over to his co-heirs whatever balance he has kept to himself from the accounts he kept for the head of the household. 2. An arbitrator whom you and I accepted to divide an inheritance between us wished to adjudicate some things to me, some to you, and realized that we should each be condemned to pay to the other something on account of these things. Could he compare the condemnations on each side and just condemn the one whose total condemnations were greater to pay the excess of his own condemnations over those of the other person? 3. It was agreed that the arbitrator could do this. In the

action for dividing an inheritance or for dividing common property, the assets as a whole should be valued, not shares in individual items.

53 ULPIAN, *Replies, book 2:* If an emancipated son lent money on condition that it would be repaid to his father, the money is reckoned as part of his father's inheritance only if an action for the same sum was available to the father against the son.

54 NERATIUS, *Parchments, book 3:* I disposed of my share of a farm belonging to the inheritance of Lucius Titius, which you and I held in common. Since then we have joined issue in an action for dividing an inheritance. The share which belonged to me will not be covered by the action; for when I disposed of it, it ceased to be part of the inheritance; nor will your share, because, although it retains its former legal status and belongs to the inheritance, it ceased to be part of the common property when I disposed of my share. It does not matter whether one heir has not disposed of his share or several have not, as long as some share has been disposed of by one of the heirs and has thus ceased to belong to the inheritance.

55 ULPIAN, *Edict, book 2:* If, in an action for dividing an inheritance or for dividing common property, the division is so difficult that it seems almost impossible, the judge can assign the whole condemnation and adjudicate all the assets to one party.

56 PAUL, *Edict, book 23:* Fruits received in the past as well as the present are taken into account not only in the action for regulating boundaries but also in the action for dividing an inheritance.

57 PAPINIAN, *Replies, book 2:* Even after an arbitrator has been accepted, brothers who divide a common inheritance by agreement are satisfying the requirements of family affection, and their division should not be revoked, even if the arbitrator delivers no judgment at the end of the proceedings, provided there is no need to give assistance to a *minor.*

3

THE ACTION FOR DIVIDING COMMON PROPERTY

1 PAUL, *Edict, book 23:* The action for dividing common property was necessary because the action on partnership is concerned with personal performances on both sides rather than with the division of common property. So the action for dividing common property fails if there is no common property.

2 GAIUS, *Provincial Edict, book 7:* It makes no difference whether it is with partnership or without it that people hold property in common; for in either case the action for dividing common property lies. There is common property with partnership where, for instance, some people have jointly purchased the same item; there is common property without partnership where, for instance, the same item has been left to several people as a legacy under a will. 1. In the three double actions—for dividing an inheritance, for dividing common property, and for regulating boundaries—it is asked who should be regarded as the plaintiff, because all the parties seem to be in the same position; however, the prevailing view is that the person who has summoned the others to court is regarded as the plaintiff.

3 ULPIAN, *Sabinus, book 30:* The only matters taken into account in the action for dividing common property are: division of the actual things held in common; of any damage caused or done to them; and of any loss thereby suffered by any of the partners or any gains received by him from the common property. 1. If the partners have made any pact among themselves without fraud, the first duty of the judge appointed to divide an inheritance or to divide common property is to uphold that pact.

4 ULPIAN, *Edict, book 19:* This action effects the division of corporeal property to

which we have title, but not the division of an inheritance too. 1. Can a well be dealt with in an action for dividing common property? Mela says it can, as long as the ground in which it is sunk is common. 2. This is an action of good faith. So if one item has been left undivided, the division of the rest of the property will be valid; and also there can be another action for dividing common property to deal with the item which remained undivided. 3. Just as division of the property itself is covered by the action for dividing common property, so too are payments; and so if someone has incurred expenses, he should recover them. Even if the action is not against the partner himself, but against the partner's heir, Labeo rightly thinks that expenses and profits received by the deceased are taken into account. Clearly, profits received or expenditure incurred before the property was common are not taken into account in the action for dividing common property. 4. Therefore, Julian writes that if we have been given *missio in possessionem* to prevent anticipated damage and I had the tenement-block shored up before we were ordered to take possession, I cannot recover that expenditure by an action for dividing common property.

5 JULIAN, *Urseius Ferox, book 2:* But suppose the case was not defended, the praetor therefore ordered us to take possession of the house, and consequently we have acquired ownership of it. Proculus gave the opinion that I can recover part of my expenditure on the house by an action for dividing common property.

6 ULPIAN, *Edict, book 19:* If someone has received fruits or incurred expenses in the belief that the farm was held in common by himself and Titius, when it was really held in common by himself and someone else, then an *actio utilis* for dividing common property can be used. So even if Titius has disposed of the farm, although the action for dividing common property does not then lie, because the common ownership has been dissolved, nevertheless an *actio utilis* will lie, this being given to deal with payments whenever something has ceased to be common. 2. If a partner has made a profit from a common farm either by letting it or by cultivating it, he is liable to an action for dividing common property; if he was acting on behalf of all the partners, he should neither receive the profit nor bear the loss; but if he was acting not on their behalf, but for his own profit alone, then preferably any loss should be charged to him. This is the rule in the action for dividing common property because it is held that he could not have let his own share in isolation from the others. But, as Papinian too writes, the action for dividing common property only lies if the person has done something which was essential to the proper administration of his own share; otherwise, if it was not essential, he can sue or be sued for unauthorized administration. 3. If expenditure is incurred after joinder of issue in an action for dividing common property, Nerva correctly thinks that this too is taken into account. 4. Sabinus and Atilicinus gave the opinion that offspring are taken into account also. 5. They also thought that this action covers both accessions to and decreases of the property. 6. If someone

buries a dead body on common ground, we must consider whether he makes the ground religious. Certainly, each person has a complete right to bury in the burial place, but neither of them alone can make ordinary ground religious. However, Trebatius and Labeo, although they think the ground is not made religious, nevertheless think there should be an *actio in factum.* 7. If you give a *cautio* in respect of a house for the full amount of damage anticipated, Labeo says you cannot have an action for dividing common property, because it was not necessary for you to give a *cautio* for the full amount, but a *cautio* proportionate to your share was sufficient; this view is correct. 8. If we own a common farm, but I have pledged my share, the farm is included in an action for dividing common property, but the creditor's legal rights over the pledge will be unaffected even if the farm is the subject of an adjudication; for even if the share in question had been handed over to another partner, the creditor's rights would remain unimpaired. But Julian says that the arbitrator appointed to divide common property should reduce the valuation of the share in view of the fact that the creditor is able to sell it under the pact. 9. Julian also writes that if a man with whom I own a slave in common pledges his share to me and then raises an action for dividing common property, he should be defeated by the defense of *pignus*; but if I do not use this defense, it is the judge's duty, if he adjudicates the whole slave to the debtor, to condemn him to pay me the value of my share; for my rights over the pledge remain unimpaired; but if the judge adjudicates the slave to me, he should only condemn me to pay the amount by which the pledge's value exceeds the sum which I lent, and he should order me to release the debtor. 10. The judge's powers allow him to make an adjudication in such a way that a farm is adjudicated to the one party, the usufruct of it to the other. 11. Otherwise, what we have said in connection with the action for dividing an inheritance applies here also. 12. Urseius says that when a neighbor has given notice banning new building work on a common building, if one of the partners is condemned on this count, he can recover a proportion of the penalty from his partner; but Julian correctly observes that this is only so if the house needed the building work.

7 ULPIAN, *Edict, book 20:* The action for dividing common property also applies to a long lease of public land. We must consider whether a long lease of public land can be divided up into sections. But preferably the judge should avoid division of this sort. Otherwise, the payment of the rent will become confused. 1. Neratius writes that if an arbitrator divides up land—other than public land on long lease—into sections, and adjudicates it to two men, he can impose servitudes as though he were dealing with two farms. 2. Those who can have a Publician action *in rem* can also use the action for dividing common property. 3. In certain cases where *vindicatio* fails, if there are still good grounds for having possession, an *actio utilis* for dividing common property is available, for instance, if something is in someone's possession in consequence of payment of a debt that did not exist. 4. But this action does not apply among robbers nor to those in possession by *precarium* nor to those who have taken possession secretly; for that form of possession is unlawful, while possession by *precarium* is certainly lawful, but it is not strong enough to be upheld in court. 5. Julian writes that if

one party who has possession issues a summons and the other party says he has taken possession by force, this action should not be given, not even after a year; for it is agreed that even after a year an interdict can be given against a person who has evicted another by force. And, says Julian, if one party says that the other has possession by *precarium*, again this action fails, because an interdict is given on *precarium* as well. Furthermore, if the plaintiff is said to have taken possession secretly, Julian says that this action must be held to fail. For, he says, an interdict is available against clandestine possession. 6. If two men have received something as a pledge, the fairest course is to give an *actio utilis* for dividing common property. 7. This should also be given if two people dispute a usufruct. 8. Likewise, if the praetor has given two people *missio in possessionem* in respect of legacies; for the need to protect these constitutes adequate grounds for possession. So the same must also be said of two unborn children. This is quite reasonable. 9. Clearly, if someone was given *missio in possessionem* to prevent anticipated damage and has later received an order to take possession, this *actio utilis* does not apply, since he can have a *vindicatio*. 10. When an action for dividing common property is concerned with a usufruct, the judge can use his powers in various ways: He may grant the parties usufruct of different sections of the property, or he may let the usufruct to one of the parties or let it to a third party, so that the litigants receive the rent without any dispute arising, or if the property is movable, he can also get the two sides to agree and give *cautiones* that they will have the usufruct for fixed periods, that is, that the usufruct will belong to each of them alternately for fixed periods of time. 11. This action is not available either to tenants or to people who have undertaken to look after a deposit, even though they have factual possession. 12. Among people who have received something as a pledge, a division should be made in the following manner: Each share should be assessed not at its real value but at the amount of the debt secured on it; and the pledge should be assigned to one of the creditors, but the debtor should not be denied the opportunity to offer repayment of the debt and redeem his pledge. The same applies when the debtor brings an action *in rem* on *pignus* and the person who has possession of the pledge offers to pay the amount assessed. 13. Suppose a debtor has pledged his share of a common farm; suppose too that his creditor is taken to court by the owner of the other share of the farm or by someone else who is the latter's creditor and that he outbids his opponent [in an auction of the property]; if the original debtor whose creditor has thus received the other share by adjudication now wishes to recover his share of the farm by repaying his debt, it is well said that he should not be given a hearing unless he is also prepared to recover the share purchased by his creditor in the said adjudication. For, indeed, if you have sold a share of something and, before delivering it to the purchaser, you have been sued for the division of common property and a further share of the thing has been adjudicated to you, there is a corresponding rule that there can be no action on sale unless the plaintiff is prepared to take the whole thing; for it is thanks to the seller's original share that the other share has passed to him by accession. In fact, the purchaser can even be sued on sale to make him accept the whole thing. One has only to consider whether there is any fraud on the part of the seller. But if, after selling his share, the seller is outbidden and loses his share, he similarly is liable to an action on sale, to make him return the purchase price. The same rule is observed in the case of mandate and other actions of this type.

8 PAUL, *Edict, book 23:* If not all but only certain of the owners of common property wish to divide it, they can have this action between them. 1. If it is uncertain whether the *lex Falcidia* applies between a legatee and an heir, they can have an action for dividing common property, or else a *vindicatio* for an uncertain share is given. The procedure is similar if a *peculium* has been left as a legacy, because it is uncertain how much the value of the *peculium* is reduced by debts to the owner. 2. The action for dividing common property also applies if someone has damaged common property, perhaps by wounding a slave or corrupting his character or by cutting down trees on a farm. 3. If a man pays too much on account of a common slave in a noxal action, the

slave is valued and the man receives a share of his value. 4. Likewise, if one partner is sued on the *peculium* for the full amount and is condemned, he has an action for dividing common property against his partner to recover a share of the *peculium*.

9 AFRICANUS, *Questions, book 7:* When a partner has been sued on the *peculium* of a common slave and has been condemned to pay the full amount, if the partner loses the property belonging to the *peculium*, there can still be an *actio utilis* for dividing common property to recover part of the money. Otherwise, it would be unfair if the whole burden of loss fell on the partner who accepted the action, since risks connected with the property in the *peculium* should be borne by both owners. For if someone has undertaken the defense of a slave on the owner's mandate, he too will recover everything he has paid in good faith, even if the *peculium* is subsequently lost. This is only so if neither party is at fault; for it was thought that if the owner being sued on the *peculium* is prepared to surrender the property in the *peculium* to the plaintiff, he should be given a hearing if good cause is shown, provided, that is, he surrenders it without fraud or trickery.

10 PAUL, *Edict, book 23:* Again, although the Aquilian action is not available against an heir, nevertheless if a deceased partner did something to common property which constitutes grounds for an Aquilian action, then his heir should pay in this action. 1. If we have only a right of use, which cannot be sold or hired, let us consider how a division can be made in the action for dividing common property. In fact, however, the praetor will intervene and put matters right, so that if the judge adjudicates the right of use to one party, the other who receives a payment is not deemed not to have the use on the grounds that the one who is seen to have the benefit of it is better off; for that is so of necessity. 2. In the action for dividing common property, the judge has to set a fair value on the property, and a *cautio* has to be given about eviction.

11 GAIUS, *Provincial Edict, book 7:* Finally, we should remind ourselves that if someone ought to receive some payment arising from common ownership and wishes to sue for payment after the destruction of the common property, then an *actio utilis* for dividing common property is given; if, for example, a plaintiff has incurred expenses in connection with common property or if someone's partner has received all the profit from a common possession, for example, a slave's labor or wages, this action takes account of all such things.

12 ULPIAN, *Edict, book 71:* If a house or a wall is common and needs repairing or demolishing or something needs to be inserted into it, then there has to be an action for dividing common property, or else one proceeds by means of an interdict for the possession of land.

13 ULPIAN, *Edict, book 75:* All the property is included in an action for dividing common property, unless anything has explicitly been excluded by common consent.

14 PAUL, *Plautius, book 3:* This action covers what has been done or ought to have been done on behalf of the partnership by someone who is aware that he has a partner. 1. Supposing I have incurred expenses in the belief that a farm is my own, if a share of the farm were the subject of a *vindicatio* I could certainly retain the amount of the expenses by using the defense of fraud; but we must consider whether I can also retain the amount if an action for dividing common property is brought against me in view of the equitable nature of the action itself. My view is that I can, because the action for dividing common property is an action of good faith; but this only holds if the action is against me. If, however, I have disposed of my share, there is nothing from which I can retain the expenses. But we must consider whether the person who

bought the property from me can retain them; for certainly if he lost a share in a *vindicatio*, he could make a retention to cover the expenses which I had incurred, just as I could; and the better view is that the expenses are retained in the action under discussion as well. This being so, it is quite correctly said that I should be given an *actio utilis* against my partner for the expenses even if the common ownership continues. For it is a different matter when I spend money on something as though it were my own, when in fact it is somebody else's or it is common; for in this case, when I spend money on it as though it were my own, I have only the right of retention, because I did not intend to put anyone under an obligation to myself. But when I think the thing belongs to Titius though in fact it belongs to Maevius or think I own it in common with someone other than the true co-owner, then I am acting in order to put somebody else under an obligation to myself, and just as I am given an action for unauthorized administration against a man whose business I have administered in the belief it was somebody else's, so too with the present action. So even if I have disposed of the land, since the position was previously such that I had a right to the action, I should still be given an action for unauthorized administration, as Julian also writes. 2. If there is an agreement that no division should be made at all, it is perfectly clear that a pact of this sort is void; but if the agreement covers only a specified period and the nature of the property is such that postponement of division is an advantage, then it is valid. 3. If the partners have agreed that the common property should not be divided within a specified period, there is no doubt that a person bound by such an agreement is permitted to sell; so if the purchaser brings an action for dividing common property, he will be defeated by the same defense as would have defeated his seller. 4. If a partner makes a pact to the effect that he will not sue for his share, this effectively ends the partnership.

15 PAUL, *Plautius, book 5:* If a partner is sued and condemned on account of a common slave, he can sue for dividing common property even before he pays; for if a noxal action is brought against one partner, he can at once sue his partner for payment of his share of the slave's value, though a *cautio* must be given that he will give back the money if he does not surrender the slave.

16 PAUL, *Plautius, book 6:* When partners are dividing a partnership, *cautiones* are usually given regarding debts to which conditions are attached.

17 MODESTINUS, *Rules, book 9:* If a farm which was pledged by a testator is purchased from the creditor by one of the testator's co-heirs, the other co-heirs should not bring an action for dividing common property against him.

18 JAVOLENUS, *Letters, book 2:* An arbitrator cannot arrange that a farm which belongs to an inheritance should be under a servitude attached to a farm which does not belong to the inheritance, because the judge's powers cannot operate outside the terms of reference of the action.

19 PAUL, *Sabinus, book 6:* If a tree has grown up on a boundary, likewise if a stone spans the boundary between two farms, so long as they remain attached to the soil, the portion which is vertically above each farm belongs to that farm, and they are not covered by the action for dividing common property. But when the stone is extracted from the ground or the tree is dug up or cut down, it becomes indivisibly common and is covered by the action for dividing common property; for its parts used to be distinct, but now they are confused. On the same principle, if two lumps of metal belonging to

two owners are melted down together, the whole lump is common, even if the original lumps are to some extent still distinct: so when a tree or stone is removed from the ground, the rights of ownership over it are blurred. 1. One should not appoint an arbitrator to divide common property in order to deal with an entrance way which is common to two houses if this is against the will of either party; for someone compelled to bid for the entrance way may sometimes have to bid for a whole house if he has no other means of access. 2. If we have a right of way through the same place and expenses have been incurred on it, Pomponius says, somewhat harshly, that we can have an action for dividing common property or an action on partnership. For how can one conceive of common possession of a right which we exercise independently? Rather, we should have an action for unauthorized administration. 3. When dealing with a slave who has run away, the judge appointed to divide common property or to divide an inheritance should order those between whom he is appointed judge to bid for the slave, and should then adjudicate him to the one who outbids the others; and there will be no danger that under the *senatus consultum*, the penalty laid down by the *lex Fabia* will be incurred. 4. Labeo says that a watercourse is not covered by the action for dividing common property; for either it belongs to the land itself and so does not come under the action, or it is not attached to the land, but is divided up according to the quantity or time available to each user. But sometimes there can be rights which are neither attached to the land nor divided according to quantity or time, for instance, when the person they belonged to has left several heirs. When this happens, it is appropriate that the rights should be dealt with by the action for dividing an inheritance; and Pomponius says he cannot see why they should be dealt with by the action for dividing common property any less than by the action for dividing an inheritance. So in cases of this sort one can also use the action for dividing common property to divide the above-mentioned rights according to either the quantity or the time available to each user.

20 POMPONIUS, *Sabinus, book 13:* If you own a farm in common with someone who has failed to answer a charge of delict in consequence of which a house has been demolished or trees cut down on the judge's directions, your loss can be made good in an action for dividing common property; for this action covers anything lost through a partner's fault.

21 ULPIAN, *Sabinus, book 30:* It is agreed that when dividing land the judge aims to do what is most advantageous to all or what the litigants prefer.

22 POMPONIUS, *Sabinus, book 33:* If I build a wall on both my own and my neighbor's behalf either with the intention of recovering a proportion of the expense from him or as a gift, the wall is common.

23 ULPIAN, *Edict, book 32:* If you and your partner have agreed to take the fruits in alternate years and the partner will not let you take the fruits in your year, let us consider whether there should be an action on hire or an action for dividing common property. The same question also arises if the partner who agreed to take the fruits in alternate years has let his livestock onto the land with the result that next year's fruits, which his partner ought to have received, are spoiled. I think the action for dividing common property applies better than the action on hire (for what sort of hire is this, when no payment is involved?), or at any rate a civil action for an uncertain amount should be granted.

24 JULIAN, *Digest, book 8:* Any profit which a common slave makes from the property of one of his owners is nonetheless common, but the owner from whose property the profit has been made can recover the sum in an action for dividing common property; for it accords with good faith that each partner should have a prior right to the profit which a slave makes from his property. 1. When I wished to sue you for the division of common property, you handed your share over to Titius in order to change the nature of the action. I can bring a praetorian action against you, because you have acted in order to stop me bringing an action for dividing common property against you.

25 JULIAN, *Digest, book 12:* If Stichus, your and my common slave, owns a *vicarius*, Pamphilus, who is worth ten aurei, and in an action on the *peculium* I have been condemned and have paid ten aurei; even though Pamphilus has subsequently died, nevertheless in an action for dividing common property or an action on partnership, you will have to pay me five, because I have released you from this debt. I shall have all the more reason to recover the sum if Stichus has acquired another *vicarius* since Pamphilus' death.

26 ALFENUS VARUS, *Digest, book 2:* While a common slave was staying with one of his owners, he broke his leg while working. Someone asked what action the other owner could have against the one with whom the slave was staying. I gave the opinion that if the common possession had suffered any damage through the owner's fault, rather than by accident, recompense could be had through an arbitrator appointed to divide common property.

27 PAUL, *Epitome of the Digest ofAlfenus, book 3:* One of the partners cannot lawfully interrogate a common slave except where a matter of common interest is at stake.

28 PAPINIAN, *Questions, book 7:* Sabinus says that none of the owners of common property can lawfully build anything on it against the wishes of the other owner. From which it is clear that a right of veto exists; for where people have equal rights, it is an established principle that a veto overrides any proposal. Yet, although one partner can stop another from building something on common property, he cannot force the other to pull down what has been built if he failed to use his veto when he could have done so; and so his loss can be made good by an action for dividing common property. However, if he gave his consent to what the other owner was doing, he has no right of action to cover his losses. But if one partner has built something in his partner's absence to that partner's detriment, then he is also compelled to pull it down.

29 PAUL, *Questions, book 2:* If someone incurs expenses on a farm in the belief that he holds it in common with Maevius when he in fact holds it in common with Titius, it is rightly said that the action for dividing common property meets his needs. For this is the position if I know the property is common but do not know who my partner is; for this is not unauthorized administration of my partner's interests; rather, I am protecting my own interests, and the action arises from the property on which I have incurred expenses rather than the person of my partner. Then we say that in this action a *pupillus* is liable to reimburse expenses on the judge's instructions. The position is different where someone thinks he is incurring expenses on his own property though it is actually common, since the action for dividing common property is not available to him, nor should he be given an *actio utilis*. For a man who knows that a property is common or belongs to someone else is administering it with the intention of placing somebody under an obligation to himself, and he is mistaken about the person's identity. 1. Pomponius wrote that any of the partners can request a judge: but even if one of the partners says nothing [with respect to the appointment of a judge], an action for dividing common property may lawfully be brought against him.

30 SCAEVOLA, *Replies, book 1:* The action for dividing common property is still lawful if neither partner has possession or if one partner does not have possession of the farm.

31 PAUL, *Replies, book 15:* Where, on the praetor's orders, two slaves have been reserved from a father's inheritance in order to serve each of his sons who are *pupilli*, it is held that they have not been divided, but remain common to all.

4

THE ACTION FOR PRODUCTION

1 ULPIAN, *Edict, book 24:* This action is extremely necessary and is in everyday use. It was introduced chiefly for the sake of the *vindicatio.*

2 PAUL, *Edict, book 21:* To produce is to grant a plaintiff access to something in public, so that he may be enabled to go to law.

3 ULPIAN, *Edict, book 24:* In this action, the plaintiff must know and state all the evidence identifying the thing which is the subject of the action. 1. A man who brings an action for production does not necessarily declare that he is the owner, nor does he have to prove that he is, since there are many grounds for the action for production. 2. Furthermore, note that in this action a contumacious defendant can be condemned to pay the amount of the plaintiff's assessment under oath, an upper limit being set by the judge. 3. This is a personal action available to anyone who intends to raise a real action of whatever kind, even the Servian action on pignus or the action on *hypotheca*, which are available to creditors. 4. Pomponius says that the action for production is also available to a man who intends to sue for a usufruct. 5. Also, if a man intends to seek an interdict and wants something to be produced, he will get a hearing. 6. Again, if I wish to choose a slave or some other thing in exercise of a choice left to me in a will, it is agreed that I can bring an action for production, in order that the things may be produced and I may claim one of them. 7. If someone wants to raise a noxal action, the action for production is essential; for what if the owner is ready to defend the case, but the plaintiff cannot pick out the slave in question unless they are all present, because either he does not recall which is the slave or he does not remember his name? Is it not right that the household should be produced for the plaintiff, so that he can recognize the guilty slave? This should be done, if good reason is given, so that an identity-parade of the slaves may be held and he may pick out the one on whose account he is bringing the noxal action. 8. If anyone apart from the heir requires production of the tablets of the will or codicils or anything else relating to the will, the proper rule is that he should not use this action, since the relevant interdicts are adequate for his purpose; that is what Pomponius says. 9. We should be aware, however, that the action for production is not just available to the persons we have mentioned, but to any interested party; so the judge, after a brief review of the case, must determine whether production of the thing is in the person's interest, not whether the thing belongs to him, and accordingly must either issue an order for it to be produced or not issue one, because his interest is not affected. 10. Julian goes further and says that even when a *vindicatio* is not available to me, I can sometimes bring an action for production, because it is in my interest. For example, suppose that in a legacy I have been left a slave to be chosen by Titius; I shall bring an action for production, because production is in my interest, in order that Titius may make the choice and I may then bring a *vindicatio* in respect of the slave—although I myself cannot make the choice if the slave is produced. 11. If I have been sued for

production, I cannot sue for production simply on the grounds that I have myself been sued in an action for production, even though it may appear to be in my interest to do so, because I am liable to restore the thing. But this is not sufficient reason. Otherwise, even a man who has fraudulently lost possession of something will be able to sue for production, although he is not going to bring a *vindicatio* or an interdict; and a thief or robber will be able to sue as well, which is not the case at all. So Neratius defines the position with discernment when he says that the judge in an action for production should determine whether the plaintiff has lawful and acceptable grounds for a further action on whose account he wishes the thing to be produced. 12. Pomponius writes that several men can lawfully have an action for production in respect of the same slave. The slave may perhaps belong to the first man, the second man may have usufruct over him, the third may claim he is in his possession, the fourth may declare that the slave was pledged to him; so the action for production is available to all of them, because they all have an interest in the slave's being produced. 13. In the same place, Pomponius adds that in virtue of the powers of arbitration granted to him, the judge in this action assesses the defenses offered by the possessor. If any of the defenses is so obviously valid that it easily defeats the plaintiff, then the possessor should be acquitted; but if a defense is less clear-cut or requires further investigation, consideration of it should be postponed until the main action, and the judge should order production of the thing. But there are certain defenses about which the judge in the action for production should always decide himself, for instance, the defenses of pact, of fraud, of oath, and of *res judicata.* 14. Sometimes, even though the action for production is not available, there is a good case for production to be granted, and so an *actio in factum* is given. Julian deals with this: Suppose, he says, my wife's slave looked after my accounts; these accounts are in your possession, and I want them to be produced. Julian says that if they are written on my paper, this action lies, because I can also bring a *vindicatio* in respect of them; for since the paper is mine, what is written on it is also mine. But if the paper was not mine, since I cannot bring a *vindicatio* in respect of it, I cannot raise an action for production either; so an *actio in factum* is available to me. 15. Remember that this action can be used against not only those who possess at civil law but also against those who have factual possession [only]. Finally, it is agreed that a creditor who received something as a pledge is liable for production;

4 Pomponius, *Sabinus, book 6:* for the action can also be used against a person who has received something as a deposit or as a loan for use or on hire.

5 Ulpian, *Edict, book 24:* Celsus writes: If someone, having undertaken a contract to export merchandise, has put the merchandise in a warehouse, he can be sued for production. Again, if the contractor has died and there is an heir, the heir should be sued; but if there is no heir, the warehouse-manager should be sued; for, says Celsus, if nobody has taken possession of the merchandise, the fact is that either it is in the possession of the warehouse-manager, or at any rate he is the person who can produce it. Celsus also asks in what way the man who contracts to transport merchandise has possession of it; is it because he holds it as a *pignus*? This case shows that persons who have the ability to produce are liable for production. 1. Julian writes that on this principle a man who is in possession of things or legacies in order to protect them is liable to an action for production; also a man who has a thing by way of usufruct, although he too is not really in possession at all. Then Julian asks: What degree of production is required of these people? In the former case, he says, the requirement is that the plaintiff should have possession, while the defendant should be in possession in order to protect the thing; while in the case of the man with usufruct, the plaintiff should have possession of the thing, while the defendant enjoys usufruct. 2. Julian

also writes that a purchaser who has not restored minerals and timber can be sued for production, the damages being according to my assessment under oath; he adds the proviso that the purchaser must be in possession or have fraudulently lost possession. 3. Again, Celsus writes that by the action for production you are enabled to remove the manure which you have piled up on my land, as long as you remove all of it; otherwise, you are not allowed to. 4. Also, if a boat has been driven onto someone else's land by the force of the river's current, Neratius says the man can be sued for production. Hence, Neratius asks whether the owner of a piece of land should be given a *cautio* about future damage alone or about past damage also; he says a *cautio* should also be given about past damage. 5. Furthermore, if in the collapse of a building something falls onto your land or your house, you are liable for production, even though you do not have possession. 6. Again, if someone, though he has possession, does not have the power to restore, he is not liable for production, for example, if his slave has run away; obviously, he is only liable to the extent that he must give a *cautio* for production should the slave come within his power. Even if the slave has not run away, but has been given permission to stay where he likes, [the same applies] or has been sent abroad, or is on his owner's estates, the owner is only liable to give a *cautio*.

6 PAUL, *Sabinus, book 14:* A gem set in someone else's gold or a statuette set in a candelabrum cannot be the subject of a *vindicatio*, but an action for production can be brought for its removal. The case of a beam incorporated into a house is different; for the action for production is not available either, since the *Law of the Twelve Tables* forbids the pulling down of the building. But under the same law one may bring the action on an incorporated beam for double the amount.

7 ULPIAN, *Edict, book 24:* We interpret the term "beam" in the *Law of the Twelve Tables* to cover all building materials, as certain people correctly understand it. 1. But if you fix my wheel onto your vehicle, you are liable for production (Pomponius also writes that this is so), although you do not have possession under civil law. 2. The same applies if you use my plank in your cupboard or ship or if you fix my handle to your cup or my reliefs to your dish or if you weave my purple into your garment or join my arm onto your statue. 3. Again, the citizens of municipalities can be sued for production, because they have the power to restore; for it is agreed that they can also possess and usucapt. The same also applies to *collegia* and other collective bodies. 4. If someone is not in possession at the time of joinder of issue, but subsequently acquires possession before judgment is given, we believe one should rule that he ought to be condemned unless he restores the thing. 5. If a man was in possession at the time of joinder of issue but subsequently without fraud loses possession, he should be acquitted. Although, Pomponius writes, there is reason to blame him for not handing over immediately, but allowing joinder of issue to take place against him. 6. Pomponius also writes that if someone had possession at the time of joinder of issue, then lost possession, but soon acquired possession again, whether by the same title or by some other, he should be condemned unless he restores the thing. 7. In the same context, Pomponius appropriately adds that the plaintiff in an action for production should have an interest in the restoration of the thing both at the time of joinder of issue and at the time when condemnation is given; Labeo agrees with this.

8 JULIAN, *Digest, book 9:* If an action for production has been brought against a man who neither had possession nor lost possession fraudulently, and subsequently, after his death, his heir has possession of the thing, the heir should be compelled to produce it. For if I sue for a farm or a slave and the heir acquires possession by the same title, he is compelled to restore it.

9 ULPIAN, *Edict, book 24:* Julian writes that if someone kills a slave in his possession or transfers possession to another or so ruins the property that no one can have it, he is liable for production, because he has lost possession fraudulently. Likewise, if he pours away or destroys wine or olive oil or anything else, he can be sued for production. 1. Acorns fall from your tree onto my land, I send my herd to feed on them; to what action am I liable? Pomponius writes that the action for production is available if I acted fraudulently when I sent the herd to eat the acorns. For even if the acorns were still there, and you would not allow me to fetch them, you could be sued for production, just as if someone would not allow me to fetch my building materials which had been deposited on his land. We agree with Pomponius's view whether the acorns are still there or have been consumed. But if they are still there, I can also have an interdict on gathering acorns, giving me permission to gather acorns every three days, if I give a *cautio* covering anticipated damage. 2. If someone has passed something on to someone else, provided he has done this fraudulently, he is deemed to have lost possession fraudulently. 3. If someone produces something in a deteriorated condition, Sabinus says he can still be sued for production. This is undoubtedly also the case if he has fraudulently altered the form of the thing, for example, if a cup has been made into a lump of metal; for even if he produces the lump of metal, he is still liable for production, since by changing the form he has virtually destroyed the substance of the thing. 4. Marcellus writes that if ten coins have been left to you as a conditional legacy and the usufruct of the ten has been left to me unconditionally and then, while the condition is still unfulfilled, the heir pays the ten to me, the usufructuary, without obtaining a *cautio*, he can be sued for production on the grounds that he has fraudulently lost possession of the coins. The fraud lies in his omitting to obtain a *cautio* from the usufructuary with the result that your legacy lapses, since you can no longer bring a *vindicatio* in respect of the money. The action for production will only lie if the condition attached to the legacy is fulfilled. However, you could have safeguarded yourself with a stipulation concerning the legacies, and if you have done this, you will have no need of the action for production. But if the heir did not know of your legacy when he took no security from the usufructuary, Marcellus says the action for production does not apply, because obviously there is no fraud. But he says relief should be given to the legatee by an *actio in factum* against the usufructuary. 5. As far as this action is concerned, to produce is to deliver a thing in the same legal state it was in at joinder of issue, in order that some person, having access to it, may be able to pursue an intended action without any harm being done to his case after he has brought the action [for production]; although the action is not concerned with restoration, but with production. 6. Accordingly, if a man produces something which he has acquired by usucapion since joinder of issue, he is held not to have produced it, since the plaintiff will have lost what he claimed; so the man should not be acquitted, unless he is prepared to join issue on the basis of the position at the previous time [when issue was originally joined], with the proviso that fruits be assessed according to statute. 7. Since in this action accessories are handed over to the plaintiff, Sabinus thought that offspring should also be handed over whether the woman was pregnant originally or has conceived subsequently, a view approved by Pomponius. 8. Furthermore, the judge should assess any advantage lost because a thing was not produced at all or was produced too late. So Neratius says that what is assessed is the advantage the thing would have brought to the plaintiff, not the thing's own value; the advantage, he says, is sometimes worth less than the thing itself.

10 PAUL, *Edict, book 26:* If someone has been given an option which has to be exercised within a stated time and the action has been dragged out until production is no use, the plaintiff's advantage should be preserved; but if the heir was not responsible for his failure to produce at the time of joinder of issue, he should be acquitted.

11 ULPIAN, *Edict, book 24:* If an inheritance has been lost because of failure to produce a slave, it is entirely just that the judge should put a value on the loss of the inheritance. 1. Let us consider where production should take place and at whose expense. Labeo says the thing should be produced at the place where it was at joinder of issue, and it should be carried or led to the place where the action is conducted at the plaintiff's risk and expense. Obviously, the possessor should feed, clothe, and look after a slave, he says. But I think that sometimes the plaintiff ought to take on these responsibilities too, if, for instance, the slave usually supported himself by his labor or his trade, but is now forced to give that up for a while. Similarly, if a slave is left with the magistrate, ready to be produced, the person who wanted him to be produced will have to take responsibility for the cost of feeding him if the possessor does not usually feed him; for if he does, as he provides his food, so he cannot refuse to pay the cost of feeding him. Sometimes the possessor should produce at the appointed place at his own expense, supposing, for instance, he has deliberately put the things in a remote spot, so that production may be more inconvenient for the plaintiff; for in this case, he will have to produce the things at his own expense and risk in the place where the action is conducted; this stops him benefiting from his dishonesty. 2. If a man is sued in connection with several things, all of which were in his possession at joinder of issue, even if he subsequently loses possession of some of them without fraud, he should be condemned unless he produces those he is able to.

12 PAUL, *Edict, book 26:* Where it is a question of production of a person on whose behalf someone wishes to bring a *vindicatio in libertatem*, this action can apply. 1. A son-in-power is also liable to this action, if it is in his power to produce the thing. 2. When a man sues for production more than once, if he brings an action on the same grounds as before, Julian says a defense will operate against him; but if someone has brought an action in order to bring a *vindicatio* in respect of something and after joinder of issue he receives the thing in question from someone, new grounds of action have arisen, and so the defense does not stand in his way. The same applies if a man has brought an action for production preparatory to an action for theft, and the thing is stolen a second time. Finally, if a man has brought an action for production in order to exercise an option and after joinder of issue he is given an option under a second person's will, he can sue for production. 3. If someone makes must from my grapes, or olive oil from my olives or clothes from my wool in the knowledge that they do not belong to him, he is liable to an action for production in respect of both things, because the better view is that what is made from my property belongs to me. 4. If a slave dies after joinder of issue, even though there is no fraud or fault on the part of the possessor, nevertheless he must sometimes be condemned to pay the amount which the plaintiff stood to gain if he, the possessor, had not prevented the slave from being produced at the time of joinder of issue; this especially holds if it is clear that the slave died through circumstances which would not have arisen if he had been produced then. 5. If for good reasons the thing cannot be produced immediately, on the judge's instructions the defendant has to give a *cautio* that he will produce it on the day. 6. This action is available to an heir not as heir, but on his own account; likewise, the possessor's heir is liable on his own account. So it is pointless to ask whether the action can be given to or against an heir. Obviously, this action should be given against an heir on account of fraud on the part of the deceased if the inheritance has thereby been increased, for example, because the heir has acquired the price received for the property.

13 GAIUS, *Urban Praetor's Edict, book . . . , Title: On Claims of Freedom:* If it is

alleged that a freeman is being detained by somebody, an interdict for the production of the man can be had against the person accused of detaining him; for the action for production is held to be inapplicable here, since it is considered to be available only to a person with a pecuniary interest.

14 POMPONIUS, *Sabinus, book 14:* If a husband pays for purchases with money which is a gift to him from his wife in the knowledge that the money has not become his own property, he has fraudulently lost possession of it and so is liable to the action for production.

15 POMPONIUS, *Sabinus, book 18:* My treasure is buried in your land and you will not allow me to dig it up. If you have not removed it, Labeo says I cannot properly bring an action for theft or for production of the treasure, because you are not in possession, nor have you fraudulently lost possession; for it could be that you do not know that this treasure is in your land. But he says it is not unreasonable that provided I swear that in making my request I am not acting vexatiously, I should be given an interdict or action to ensure that as long as I am not responsible for any failure to give you a *cautio* for damage anticipated as a result of the work, you will not use force to stop me digging up, removing, and carrying away the treasure. But if the treasure has actually been stolen, the action for theft can also be used.

16 PAUL, *Sabinus, book 10:* When a slave has something, his owner can be sued for production on his own account. But if the slave has fraudulently lost possession without the owner's knowledge, a noxal action should be given on the slave's account either for theft or for fraud; but no *actio utilis* for production should be set in motion.

17 ULPIAN, *All Seats of Judgment, book 9:* If someone produces a slave who has been disabled or blinded in one eye, as far as the action for production is concerned, he should be acquitted; for he has produced the slave, and such production is no impediment to the direct action. But the plaintiff will be able to bring an Aquilian action for the damage.

18 ULPIAN, *Opinions, book 6:* When a promissory note has been made void by performance and the pledges have been released, the creditor may nevertheless bring an action to have the documents relating to the contract produced by someone other than the debtor.

19 PAUL, *Epitome of Alfenus, book 4:* All interested parties can sue for production. But a man inquired whether this action could effect the production of his opponent's accounts in whose production he had a great interest. The reply was that the civil law should not be applied vexatiously or interpreted in a captious spirit, but the correct procedure is to consider the intention behind each statement. For by the same reasoning, a student of some discipline could say that it was in his interest for such and such books to be produced for him, because if they were produced, he would be more knowledgeable and better when he had read them.

20 ULPIAN, *Rules, book 2:* Where the offenses of slaves are concerned, one can bring an action for production with a view to interrogating them in order to make them reveal their accomplices.

BOOK ELEVEN

1

INTERROGATIONS BEFORE THE MAGISTRATE AND INTERROGATORY ACTIONS

1 CALLISTRATUS, *Monitory Edict, book 2:* The heir should be interrogated before the magistrate about his share of the inheritance whenever an action is brought against him and the plaintiff is uncertain to what share the person he wishes to sue is heir. Interrogation is necessary whenever the action is a personal one and for a specified sum of money; it ensures that the plaintiff does not on occasion claim too much and so suffer loss, because he does not know to what share of the deceased's estate the defendant is heir. 1. Interrogatory actions are no longer in use, because nobody is compelled to give any answer about his own legal status before the case is heard; so these actions are not used so much and have fallen into disuse. Statements made by the other side in court provide the litigants with sufficient evidence regarding inheritances or other matters which come up in court.

2 ULPIAN, *Edict, book 22:* The reason why the praetor issued the edict about interrogations was that he knew it was difficult for someone suing an heir or *bonorum possessor* to prove that the person was heir or *bonorum possessor,*

3 PAUL, *Edict, book 17:* because it is usually difficult to prove that an inheritance has been accepted.

4 ULPIAN, *Edict, book 22:* The praetor wished to bind the defendant by the reply he gives in court, so that whether he confesses the truth or he lies he may accept the consequences and also so that by means of an interrogation he may ascertain to what share each person is heir. 1. The praetor's words "who replies when interrogated before the magistrate (*in jure*)" should be understood to include magistrates of the Roman people, provincial governors, or other judges; for *jus* refers simply to a place where a magistrate or judge stops for the purpose of administering justice, even if he does this at home or on a journey.

5 GAIUS, *Provincial Edict, book 3:* If someone is interrogated as to whether he is heir or what his share of the inheritance is or whether the person on whose account a noxal action is being raised is in his power, he should be granted time to consider the matter; for if his answer is incorrect, it is to his disadvantage.

6 ULPIAN, *Edict, book 22:* And since it is important for the dead to have successors, it is also important for the living not to be rushed, provided that their deliberations are justified. 1. Sometimes when interrogated as to whether he is heir, a man is not forced to reply, for example, if somebody else is disputing the inheritance with him. This was decreed by the deified Hadrian, to prevent the man either from prejudicing

his case if he denied that he was heir or from being bound if he said he was heir yet later had the inheritance taken away from him.

7 ULPIAN, *Edict, book 18:* If someone is interrogated before the magistrate as to whether he owns a quadruped which has caused *pauperies*, and he replies that he does, then he is liable.

8 PAUL, *Edict, book 22:* If someone is interrogated about a slave who has caused damage and replies that it is his slave, he is liable under the *lex Aquilia* as if he were owner; and if there has been an action against the person who so replied, the real owner is released from liability to the action.

9 ULPIAN, *Edict, book 22:* If, without interrogation, someone replies that he is heir, that is regarded as a reply under interrogation. 1. We should understand that interrogation can be carried out not just by the praetor, but also by the opponent. 2. But if a slave is interrogated, the interrogation is void, just as if a slave did the interrogating. 3. One man should not be compelled to reply on behalf of another as to whether he is heir; for a man should only be interrogated in court about himself, that is, when he himself is being sued. 4. Celsus, in the fifth book of his *Digest*, writes: If a person who is defending someone else is interrogated in court as to whether the person whom he is defending is an heir or what his share of the inheritance is, and he gives a false answer, the person conducting the defense is himself liable to the plaintiff, but the case of the person whom he is defending is not prejudiced. Celsus's view is certainly true. So we must consider whether the person conducting the defense should be regarded as failing to defend the other if he gives no answer; it certainly follows that he is failing to do so, because he is not defending the other to the full. 5. If someone, when interrogated, replies that he is heir, but does not add what his share is, he should be deemed to have replied that he is sole heir, unless perhaps he is interrogated as to whether he is heir to a half share, and he replies, "I am heir," in which case I think he has really replied to that particular interrogation. 6. It is asked whether anyone can be compelled to answer when asked whether he is heir under a will and whether he has acquired the inheritance in his own right or through persons who are subject to his power or through someone whose heir he is. So when the question arises whether someone ought to say in what capacity he is heir, the praetor should briefly investigate the facts, so that if he discovers that it is really germane to the case, he may instruct the person to give a more detailed answer. This applies not only to heirs but also to praetorian successors. 7. Finally, Julian writes that in addition, a man who has had an inheritance restored to him should, when interrogated, say whether the inheritance has been restored to him. 8. In an action on the *peculium*, the father or owner should not reply if asked whether he has the son or slave in his power, because the only question at issue is whether the *peculium* is in the defendant's possession.

10 PAUL, *Edict, book 48:* If we wish to make a stipulation with someone regarding anticipated damage, it is appropriate to interrogate him before the magistrate as to whether he owns the building or place from which damage is feared and what is his share in it. Then, if he denies the land is his and gives no *cautio* concerning the anticipated damage, he may either be forced to surrender the land, or if he decides to resist this, he may be forced to hand it over on the grounds of fraudulent behavior.

11 ULPIAN, *Edict, book 22:* Sometimes a man must also reply when interrogated about his age. 1. If someone, though he is not an heir, replies under interrogation that he is heir to a certain share, he is sued as though he were heir to that share; for what he says against himself is taken as true. 2. When someone who is heir to a quarter or is not an heir at all replies that he is sole heir, an action can be brought against him on the assumption that he is sole heir. 3. If someone says he is heir to a quarter when he is

heir to a half, the penalty he pays for his lie is to be sued for the full amount; for he should not have lied, declaring that he is heir to a smaller share than is really the case. Sometimes, however, he may have good reason for believing he is heir to a smaller share than is in fact so; for what if he is unaware that a further share has come his way by accretion, or what if he is instituted to an uncertain share? Why should his reply be to his detriment? 4. Also, if someone refuses to answer before the praetor, the position is that should an action be brought against him, he can be sued for the full amount, as though he had denied that he was heir. For a man who does not reply at all is contumacious, and as a penalty for his contumacy, he should be sued for the full amount, just as if he had denied being heir; for he is held to display contempt for the praetor. 5. As for the praetor's words "not replied at all," later lawyers have interpreted this to mean that a man is regarded as not replying at all if he does not reply to the particular interrogation, that is, "to the exact form of words." 6. If, when interrogated as to whether he is sole heir, someone replies that he is heir to a certain share, if in fact he is heir to a half, his reply is not to his disadvantage; this is a generous view. 7. It makes no difference whether the person who is interrogated answers in the negative or says nothing or gives an obscure reply so as to leave the interrogator in doubt. 8. Relief should undoubtedly be given, where there is good reason, to a person who has replied to an interrogation. For if someone is interrogated as to whether he is his father's heir and he replies that he is, but shortly afterward the will is produced and he is found to have been disinherited, then the fairest course is to grant him relief. Celsus too writes that this is so, though he adds another reason: that facts which subsequently come to light may make relief necessary. For what if the tablets of the will were hidden or were a long way away but are subsequently brought to light? Why should a man be disadvantaged for replying according to what seemed true at the time? I think the same applies when a man answers that he is heir, but shortly afterward the will is declared to be forged or undutiful or void. For there was nothing unprincipled about his answer, but he was influenced by the document. 9. A man who replies to interrogation is bound, as if by a contractual obligation on which he can be taken to court, provided he is interrogated by his opponent. But even if he is interrogated by the praetor, no importance is attached to the praetor's authority, but only to the man's reply or lie. 10. If, through a justifiable error, anyone denies that he is heir, he deserves pardon. 11. Even if someone replies negligently, though without fraud, one should take the view that he ought to be acquitted, unless the negligence borders on fraud. 12. Celsus writes that a man may go back on his reply, provided that he does not thereby cause the plaintiff any disadvantage. I think this is quite right, especially if a man does so subsequently in the light of fuller information, being apprised of his legal position by documents or letters from friends.

12 PAUL, *Edict, book 17:* If, when interrogated before the magistrate, a son who refused his father's inheritance replies that he is heir, he will be liable; for he is held to have behaved as heir in so replying. But if a son who refused the inheritance gives no answer when interrogated, he should be released from liability, because the praetor does not regard a man who has refused an inheritance as an heir. 1. The defenses which are offered by defendants who have actions brought against them in court (for example, the defense of pact, of *res judicata*, and so forth) may also be used by a defendant who is sued on his reply.

13 PAUL, *Plautius, book 2:* People who reply with a false confession are bound by it only if an action lies against somebody or other in respect of the matter about which they have been interrogated; for if an action would have been brought against somebody else, assuming he was owner, then we bring the action upon ourselves by our confession. If I reply that a person in his father's power is my own son, I am only bound by that reply if his age is consistent with his being my son; for false confessions should be consistent with the nature of things. [In which circumstances I am not bound by a reply on behalf of the head of a household.] 1. A man who replies that the

head of a household is his slave is not liable to a noxal action; even if a free man is acting in good faith as my slave, I cannot be sued by a noxal action, and if I am sued, a fresh action may still be brought against the person who committed the offense.

14 JAVOLENUS, *From Cassius, book 9:* If issue has been joined in a noxal action, and if, while the action is still in progress, the person on whose account it has been brought is judged free by a court, the defendant must be acquitted, and any interrogation conducted before the magistrate has no validity; for in a noxal action against somebody on account of some person, it is possible to transfer responsibility for the person in question to somebody else who confesses before the magistrate that the person is his (for example, he may confess that somebody else's slave is his own); but since one cannot have an action against another on account of a freeman, the responsibility cannot be transferred even through interrogation or confession. This being so, it follows that there can be no lawful action on account of a freeman against a person who confesses ownership of him. 1. In general, confessions are valid if their content is consistent both with law and with nature.

15 POMPONIUS, *Sabinus, book 18:* If, before accepting an inheritance, I reply that a slave belonging to the inheritance is my own slave, I am liable, because the inheritance is regarded as the owner. 1. If a man, when interrogated before the magistrate, confesses that a slave is his own and then the slave dies, the man is not liable, just as he would not be liable after the death of a slave who was really his own.

16 ULPIAN, *Edict, book 37:* If a slave is captured by the enemy and someone, when interrogated before the magistrate, replies that the slave is in his power, I do not think, though the law of *postliminium* could make one hesitate, that a noxal action is applicable, because the slave is not in his power. 1. Although it is held that a man who confesses to owning someone else's slave is liable, it has been quite rightly held that he is liable only if he could have owned the slave; but if he could not have acquired ownership, he is not liable.

17 ULPIAN, *Edict, book 38:* If a slave belongs not to one man but to several, and if all or some of them falsely deny that the slave is in their power or if they fraudulently let the slave out of their power, then each of them will be liable in full, just as they would be if they had the slave in their power. But a man is not liable if he has not let the slave out of his power fraudulently nor denied ownership.

18 JULIAN, *Urseius Ferox, book 4:* An heir to half an estate wanted to defend the coheir in his absence, so that he could avoid the burden of giving security, so he replied that he was sole heir and was condemned. Since he was insolvent, the plaintiff asked whether the previous judgment could be rescinded and an action be given against the true heir. Proculus replied that the judgment could be rescinded and an action brought, which is quite correct.

19 PAPINIAN, *Questions, book 8:* If a son who is representing his father says nothing when interrogated, proceedings should continue as though he had not been interrogated.

20 PAUL, *Questions, book 2:* Anyone who replies that another man's slave is his own, if he is defendant in a noxal action, releases the owner from further liability; this is different from the case of a man who confesses to killing a slave who was killed by somebody else or a man who replies that he is heir; for then the killer or the true heir is not released from liability. There is no contradiction; for in the former case two people are liable on the slave's account, just as in the case of a common slave, where if one owner is sued, the other is released; but the man who confesses to killing or wounding is liable on his own account; yet his reply should not allow the offense of the person who did the deed to go unpunished, unless he was defending the guilty party or the heir and undertook the action on that basis; for then the plaintiff should be defeated by the granting of a defense *in factum*, because he will recover what he has paid by an action for unauthorized administration or an action on mandate. The same applies to the person who on the heir's mandate replies that he is heir or who wants to defend the heir for some other reason. 1. When a man is interrogated before the magistrate as to whether he has possession of a farm, should he be compelled to say in reply what share of the farm he possesses? My opinion was: Javolenus writes that the possessor should be compelled to say in reply how big a share of the farm he possesses, so that if he says he possesses less than he really does, the plaintiff may be given *missio in possessionem* of the other, undefended share. 2. The same applies when a *cautio* is given about anticipated damage; here too the man's reply should say how big a share of the land is his, so that the stipulation can be for the corresponding amount. The penalty for failure to give the stipulatory promise is that the other party takes possession, and therefore it is important to know whether the person has possession.

21 ULPIAN, *Edict, book 22:* There is no doubt that an interrogation should also be allowed whenever the judge is persuaded by considerations of equity.

22 SCAEVOLA, *Digest, book 4:* When an imperial procurator interrogated one of a man's sons concerning a debt to the imperial treasury, he replied that he was heir, although he did not have *bonorum possessio*; nor was he heir. Can he be sued by the other creditors by an interrogatory action, as it were? The opinion given was that he could not be sued on his reply by those who had not themselves interrogated him before the magistrate.

2

WHAT MATTERS MAY BE TAKEN TO THE SAME JUDGE

1 POMPONIUS, *Sabinus, book 13:* If several people are involved in an action for dividing an inheritance, and the same people are involved in an action for dividing common property or for regulating boundaries, the same judge should be appointed for each action. Furthermore, to make it easier for the co-heirs or partners to meet, they should all gather in the same place.

2 PAPINIAN, *Questions, book 2:* When one of several tutors is sued because the rest are not solvent, if he makes application, they are all sent before the same judge. This is laid down in imperial rescripts.

3

THE ACTION FOR MAKING A SLAVE WORSE

1 ULPIAN, *Edict, book 23:* The praetor says: "Whoever is said to have harbored another's male or female slave or with fraudulent intent to have persuaded the slave to do something by which he made him or her worse, against him will I give an action for double the amount involved." 1. A man who buys a slave in good faith is not

liable under this edict, [because] nor can he himself sue for making a slave worse, because he has no interest in the slave's not being made worse. Indeed, clearly, if he were allowed to sue, then the action for making a slave worse would be available to two different people, which is absurd. Nor, in our view, is this action available to someone whom a freeman is serving in good faith as a slave. 2. We interpret the praetor's word "harbored" to mean admitting another man's slave to one's house; strictly speaking harboring is enabling a slave to take refuge, with a view to concealing him, either on one's own land, or on ground or in a building belonging to somebody else. 3. Persuading is more than suggesting; for to persuade is virtually to compel and enforce obedience. But persuasion is a neutral concept, for one can persuade by giving good advice or by giving bad; therefore, the praetor adds: "fraudulently, in order to make him worse." For no offense is committed unless the slave is persuaded to do the sort of thing which will make him worse. So it appears that this edict condemns anyone who incites a slave to do or to contemplate something wrong. 4. But is the person liable only if he has driven an honest slave to wrongdoing, or is he also liable if he has given a bad slave encouragement or shown him how he could commit an offense? The better view is that he is also liable if he has shown a bad slave how he could commit an offense. Indeed, even if the slave would have run away or committed the theft anyway, if the person gave his approval to the slave's intention, he is liable; for wickedness ought not to be increased by the approval of others. So whether one makes a good slave bad or a bad slave more so, one is held to have made him worse. 5. One also makes a slave worse if one persuades him to commit an injury or theft, to run away, to incite another man's slave, to mismanage his *peculium*, to become a lover, to play truant, to practice evil arts, to spend too much time at public entertainments, or to become seditious; or if, by argument or bribe, one persuades a slave-agent to tamper with or falsify his master's accounts, or to confuse accounts entrusted to him;

2 PAUL, *Edict, book 19:* or if one makes a slave extravagant or defiant; or persuades him to be debauched.

3 ULPIAN, *Edict, book 23:* By adding "fraudulently," the praetor stigmatizes the cunning of the person who persuades the slave. But if someone makes a slave worse without fraudulent intent, he is not stigmatized, and if he did it for a joke, he is not liable. 1. So is someone liable if, when he persuades another man's slave to climb onto a roof or to go down a well, the slave obeys him and does so and falls and breaks his leg or some other part of his body or is killed? If he persuaded him without fraudulent intent, he is not liable; if with fraudulent intent, he is.

4 PAUL, *Edict, book 19:* But it is more appropriate that he should be liable to an *actio utilis* under the *lex Aquilia.*

5 ULPIAN, *Edict, book 23:* The phrase about fraud must also be applied to anyone who harbors a slave, so that he is not liable unless he harbors fraudulently. But if someone harbors a slave in order to guard him for his owner or because he is moved by humanity or compassion or any other acceptable and lawful motive, then he is not liable. 1. If someone fraudulently persuades a slave to do something in the belief that the slave is a freeman, I think that he should be liable; for the crime of making worse a person whom one believes to be free is a more serious one; so if the person is in fact a slave, one is liable. 2. This action is for double the amount even when the defendant pleads guilty, although the *lex Aquilia* only penalizes a defendant who denies the charge. 3. If the accused is a male or female slave, an action with the possibility of noxal surrender is given. 4. This action relates to the date when the slave was made worse or was harbored, not to the present; so even if the slave has died or has been disposed of or manumitted, the action still lies, and once there are grounds for the action, it is not extinguished by manumission.

6 PAUL, *Edict, book 19:* For this action is concerned with the assessment of the value of the slave in the past.

7 ULPIAN, *Edict, book 23:* For even bad slaves may gain their liberty, and sometimes subsequent events provide good reason for manumission.

8 PAUL, *Edict, book 19:* The heir of a man whose slave has been made worse can also have this action, not only if the slave has remained in the inheritance but also if he has left it, perhaps as a legacy.

9 ULPIAN, *Edict, book 23:* Suppose someone has made worse a slave whom he and I hold in common. Julian, in the ninth book of his *Digest,* considers whether he is liable to this action and replies that he can be sued by his partner; in addition, according to Julian, he can be sued for dividing common property and on partnership, if they are partners. But why does Julian place the partner in a weaker position when suing his partner than when suing a stranger? For, Julian says, he can sue a stranger either for harboring or for making worse, but he can only sue his partner for making worse, and there is no alternative. Unless perhaps Julian thought the other charge inapplicable to a partner; for a man cannot harbor his own property. But if he harbored with the intention of concealing, one can make a case for his being liable. 1. Should I have the usufruct over a slave and you have the title, if I make the slave worse, you can sue me, and if you make him worse, I can have an *actio utilis*; for this action relates to all sorts of making worse, and it is evidently in the usufructuary's interest that the slave over whom he has usufruct should be honest. If some other person should harbor the slave or make him worse, then an *actio utilis* is available to the usufructuary. 2. The action is given for double the sum involved. 3. But it is disputed whether the assessment should only cover damage to the slave's body and character, that is, the decrease

in the slave's value, or whether it should cover other things too. Neratius says that the guilty party should be condemned to pay the sum by which the slave's value has decreased as a result of his being made worse.

10 PAUL, *Edict, book 19:* This action also includes assessment of the value of any things which the slave took away with him; for all losses are doubled, and it makes no difference whether the things were brought to the defendant or to somebody else or even whether they were consumed; for it is more just that the instigator of the crime should be liable than that the recipient of the goods should be sought out.

11 ULPIAN, *Edict, book 23:* Neratius says that thefts committed subsequently are not assessed. I think this view is correct; for the phrase "the sum therein involved" in the edict covers all the relevant damage. 1. If I have persuaded a slave to tamper with the promissory notes of debtors, I am, of course, liable. But if subsequently his wrongdoing becomes a habit and he steals or falsifies and deletes accounts and other such documents, one must rule that I am not liable for making him worse on these counts. 2. Although the action for making a slave worse lies on account of stolen property, we can also bring an action for theft; for it would seem that the property has disappeared with the aid and advice of the person who incited the slave. Nor is it enough to bring either one of these actions; for the one does not rule out the other. Julian writes that the same also applies to someone who harbors and conceals a slave and makes him worse; for the offenses of theft and of making a slave worse are quite distinct. What is more, he is also liable to a *condictio*. For even when the plaintiff has succeeded in a *condictio* for the slave and has had the offender penalized in an action for theft, he must still recover his losses by an action for making a slave worse,

12 PAUL, *Edict, book 19:* because the defendant remains liable even after the property is returned.

13 ULPIAN, *Edict, book 23:* This action has no time limit and is not temporary; it lies in favor of the heir and other successors, but is not given against the heir, because it is penal. 1. Also, if a man makes worse a slave belonging to an inheritance, he is liable to this action; but he is also liable to a claim to the inheritance, as a plunderer,

14 PAUL, *Edict, book 19:* so that the claim to the inheritance covers just as much as this action. 1. This edict does not apply to the case of a son- or daughter-in-power who has been made worse, because the action has been established specifically to deal with making worse a slave who is part of one's estate (in which case the owner can prove that he is financially worse off, although the dignity and reputation of the house remains unimpaired); but an *actio utilis* is available, in which it is the judge's duty to make an assessment of damages, since it is important that the character of one's children should not be made worse. 2. If a slave owned by you and me in common has made worse my own slave, Sabinus says that I cannot sue my partner, just as if my own slave had made a fellow slave worse. Again, if a common slave makes worse somebody else's slave, we should ask if the two owners should be sued jointly or can also be sued individually, as in other noxal cases. The better view is that each co-owner is liable for the full amount, but if one pays, the other is released from liability. 3. If a slave over whom I have usufruct has made my slave worse, I can sue the owner of the title. 4. A debtor can have this action on account of a slave whom he has given as a pledge. 5. In this action, double damages are not awarded on top of any property recovered; for the loss caused is what is doubled. 6. Accordingly, it is agreed that if you persuade my slave to steal from Titius, you are not only liable for

the amount of harm done to the slave but also for what I have to give to Titius. 7. Again, not only if I myself suffer loss at the hands of my own slave at your instigation but also if a third party does, I can sue you on account of my liabilities under the *lex Aquilia*. Again, if I can be sued on hire by somebody because I hired my slave out to him and you made the slave worse, I can sue you on that account; and the same applies in similar cases. 8. In this action, damages are assessed at the amount by which the slave's value has dropped; it is the judge's duty to work this out. 9. Sometimes the slave is actually rendered useless, so that he is not worth having. Should the instigator then be compelled to pay the slave's value, while the owner keeps the slave as well, or should the owner be compelled to surrender the slave and receive payment of his value in return? The better view is that the owner should be given a choice: If he wishes, he can keep the slave and receive double the loss in the slave's value; or he can surrender the slave, if he is able to do so, and receive the slave's value, or if he is not able, he can receive the value in the same way and grant the instigator the right to bring at his own risk actions on the ownership of the slave. What has been said about surrendering the slave only applies if the slave is alive at the time of the action. But what if he has been manumitted before the action is brought? The owner will not get a sympathetic hearing from the judge if he says he manumitted the slave, because he did not want to have him in his household—his purpose being to get both the money and a freedman.

15 GAIUS, *Provincial Edict, book 6:* A slave's character is also made worse if he is persuaded to behave insolently toward his owner.

16 ALFENUS VARUS, *Digest, book 2:* An owner manumitted a slave-steward, and subsequently received the accounts from him; since they did not balance, he discovered that the slave had spent the money on a woman who was not very reputable. The question was asked whether the owner could sue the woman for making a slave worse, when the slave in question was now a free man. I replied that he could, but he could also sue for theft in respect of the money which the slave had handed over to her.

17 MARCIAN, *Rules, book 4:* The action for making a slave worse is available to a husband against his wife even when the marriage is still in force, though, out of deference to the married state, it is for the simple amount.

4

RUNAWAY SLAVES

1 ULPIAN, *Edict, book 1:* A man who conceals a runaway is a thief. 1. The senate has decreed that runaways should not be allowed into woodland nor protected by the bailiffs or procurators of the owners, and it has fixed a fine; but if within twenty days they either return the runaways to their owners or produce them before magistrates, the senate has granted them pardon for their previous conduct. The same *senatus consultum* later gives impunity to anyone who, after discovering runaways on his land, hands them over to the owner or to magistrates within the appointed time. 2. This *senatus consultum* also grants a soldier or civilian access to the land of senators or civilians for the purpose of searching for a runaway (provision was also made for this previously in the *lex Fabia* and in a *senatus consultum* of Modestus's

consulship); those wishing to search for runaways should be given a letter addressed to the magistrates, and a fine of one hundred solidi is prescribed for magistrates who on receipt of such a letter give no assistance to the searchers. The same penalty is prescribed for a man who prevents his own property from being searched. There is also a general letter from the deified Marcus and Commodus which declares that governors, magistrates, and police must assist the owner in searching for runaways, both with returning them when they find them and with punishing the people on whose property they hide, if an offense is involved. 3. Every person who apprehends a runaway must produce him in public. 4. Magistrates are rightly warned to keep careful guard on them in case they escape. 5. "Runaway" should be interpreted as covering a truant as well. But Labeo, in the first book of *Edict*, writes that the term "runaway" does not include a child born to a female runaway. 6. "To be produced in public" is taken to mean to be handed over to municipal magistrates or public servants. 7. Careful guard may include chaining. 8. The runaways are kept under guard until they are brought before the prefect of the city guard or the governor. 8a. The magistrates should be told the names and distinguishing features of runaways, and those to whom they say they belong, so that they may more easily be recognized and caught. (The term "distinguishing features" also includes scars.) The law is the same if this information is posted up in public notices or on a sacred temple.

2 CALLISTRATUS, *Judicial Examinations, book 6:* Straightforward runaways should be returned to their owners, but if they have pretended to be free men, they are usually punished more severely.

3 ULPIAN, *Duties of Proconsul, book 7:* A rescript of the deified Pius says that a man who wishes to look for a runaway on somebody else's land can approach the governor, who will give him a letter, and, if circumstances demand, an attendant, so that he may get permission to enter the land and search; and the said governor should impose a penalty on anyone who refuses permission for a search to be made. Also, the deified Marcus, in a speech delivered in the senate, granted to those who wish to search for runaways the opportunity of entering the land of the emperor, senators, and civilians alike and of examining the beds and tracks of those concealing the runaways.

4 PAUL, *Views, book 1:* Harbor masters and police, when they arrest runaways, should keep them in custody. Municipal magistrates should send runaways whom they have arrested to the headquarters of the provincial governor or proconsul.

5 TRYPHONINUS, *Disputations, book 1:* A runaway slave cannot escape his owner's power even if he volunteers for the arena and subjects himself to its dangers, which present so great a risk to his life. For a rescript of the deified Pius says that such slaves should always be returned to their owners whether before they have fought with wild beasts or after; for sometimes they have embezzled money or committed some more serious crime and have chosen to volunteer for the arena, in order to escape an investigation or the punishment they deserve; so they ought to be returned.

5
GAMBLERS

1 ULPIAN, *Edict, book 23:* The praetor says: "If someone assaults a man on whose premises gambling is said to have taken place or causes him any damage or if anything is stolen from his home while gambling is going on, I shall not give an action. I shall punish any man who uses force for the sake of gambling according to the circumstances of the case." 1. If gamblers commit robbery against each other, an action for violent robbery will not be refused. For it is only the manager of the gambling establishment who is prevented from seeking redress, not the gamblers as well, though they too may seem unworthy characters. 2. Also, note that if the manager is assaulted or suffers loss, wherever or whenever this occurs, he gets no redress; but theft only goes unpunished if it took place in his home while gambling was in progress; in each case it makes no difference if the guilty party was not a gambler. It is certain that "home" should be interpreted to mean residence or domicile. 3. When the praetor says that he will not give an action for theft, does that refer only to a penal action, or does it also apply if the person wishes to bring an action for production or a *vindicatio* or a *condictio*? Pomponius says only the penal action is refused, but I do not think this is right; for the praetor says simply: "If anything is stolen, I shall not give an action." 4. He says: "I shall punish any man who uses force for the sake of gambling according to the circumstances of the case." This clause concerns the punishment of someone who compels another to gamble, so that he may either be fined or be sent to the stone quarries or public jail.

2 PAUL, *Edict, book 19:* For some people are accustomed to force others to gamble either from the start or to keep them gambling when they themselves are losing. 1. A *senatus consultum* has forbidden playing for money, except when one is competing at spear- or javelin-throwing, running, jumping, wrestling, or boxing, which are contests of strength.

3 MARCIAN, *Rules, book 5:* In these cases, under the *lex Titia*, *lex Publicia*, and *lex Cornelia*, one can also make a *sponsio*; but under other laws one cannot do so when it is not a contest of strength.

4 PAUL, *Edict, book 19:* One is allowed to gamble for the food which is set out at a dinner party. 1. If a slave or son-in-power loses, the father or owner can reclaim what he lost. Also, if a slave wins some money, an action on the *peculium* can be given against the owner, not a noxal action, because the action arises from unauthorized administration; but he should not be compelled to hand over more than is actually in the *peculium* as a result of the slave's win. 2. Under this edict an *actio utilis* should be given against parents and patrons for the recovery of gambling losses.

6

IF A SURVEYOR GIVES A FALSE REPORT ABOUT MEASUREMENTS

1 ULPIAN, *Edict, book 24:* The praetor has provided an *actio in factum* against land surveyors. We ought not to be deceived by them, because it is important for us not be misled when we receive a report about the area of a piece of land, for instance, if we are involved in a boundary dispute or if a buyer or seller wants to know what area of land is being sold. The reason why the praetor has provided this action is that the early lawyers held that when one engages someone like a surveyor, one does not hire him, but rather he provides his services as a favor, and the payment he receives is by way of remuneration; hence, it is called an honorarium. Moreover, if an action on hire is raised, one must rule that the claim does not hold good. 1. This action only applies where there is fraud. For it is agreed that there is an entirely sufficient check on surveyors if, having no obligations under civil law, they can be sued for fraud alone. Accordingly, if the surveyor has been incompetent, the person who engaged him has only himself to blame; even if the surveyor has been negligent, he is not at risk, though obviously extreme negligence will be regarded as fraud. Even if he accepts payment, he is not liable for every kind of negligence, because of the wording of the edict; for the praetor certainly knows that surveyors sometimes act for payment. 2. A surveyor is only liable to this action if he has made his report, but he should be held to have made his report if he has reported via somebody else.

2 PAUL, *Edict, book 25:* or by letter. 1. If I instruct you, a surveyor, to survey some land and you delegate the job to Titius, who acts fraudulently in some way while doing the job, then you are liable, since you have acted fraudulently in trusting a man like that.

3 ULPIAN, *Edict, book 24:* If I commission two surveyors and they both act fraudulently, each can be sued for the full amount; but if I sue one and he pays what is due, I must be refused an action against the other. 1. This action is available to anyone in whose interests it is that the report of the area should not be false, that is, to the purchaser or the seller, as the case may be, who is adversely affected by the report. 2. But Pomponius writes that if the purchaser pays the seller too much because of the surveyor's report, since the buyer can have a *condictio* for the excess payment, he cannot have an action against the surveyor; for since the *condictio* is available, the falsity of the surveyor's report makes no difference to him, unless the seller is insolvent, in which case the surveyor is liable. 3. But if the seller, being misled by the surveyor, hands over too large an area, then correspondingly, Pomponius says that no action is available against the surveyor, because there is an action on sale against the purchaser, unless, in this case, the purchaser is insolvent. 4. Pomponius also writes that if I engage a surveyor in connection with a court case and he deceives me in his report, I can sue him if as a result I win less than I should from the judgment; to be sure, if the surveyor is engaged by the judge and fraudulently produces a report damaging to me, Pomponius wonders whether I can sue, but he thinks that I probably can. 5. He writes that this action should be given to an heir and such persons, but should be refused against an heir and such persons. 6. He says that on account of a slave, a noxal action is available in preference to an action on the *peculium*, although a civil action on the *peculium* is indeed available.

4 PAUL, *Edict, book 25:* This action has no time limit, because the basis for it lies not in the fraud, but begins at the moment when the job was undertaken.

5 ULPIAN, *Edict, book 24:* If a surveyor does not give a false report of the area, but delays his report with the result that the seller is released from his promise to assign an area by a certain day, this action is not applicable; and Pomponius says that an *actio utilis* should not be given either. So resort must be had to the action for fraud. 1. If, when there has been a false report of the area, the purchaser has sued the seller on sale, he will be able to sue the surveyor as well; but if his interests are not affected, the surveyor should not be condemned. If, however, he has not sued the seller for the total area that was missing in the sale, but only for a portion, Pomponius writes accordingly that he can sue the surveyor for the residue. 2. The praetor has extended the scope of this action, for it is available if someone is alleged to have made a false statement about the amount of something else. So if someone lies about the size of a building or the quantity of some grain or wine,

6 PAUL, *Edict, book 24:* or if there is an inquiry concerning the width of a right of way or a servitude for using a building as support or letting a building overhang, or if someone lies about the measurement of an open space or the quantity of some building materials or stone,

7 ULPIAN, *Edict, book 24:* or about anything else, he is liable. 1. This action is also given against a surveyor who uses mechanical instruments, if he deceives. 2. What is more, Pomponius says this action is even available against someone who is not a surveyor, if he has given a false statement about an area. 3. By analogy the action should also be given against an architect who deceives; and this is correct; for the deified Severus decreed that an action should be given against an architect or contractor. 4. I think actions should also be given against accountants who deceive in their calculations.

7

RELIGIOUS THINGS, FUNERAL EXPENSES, AND THE RIGHT TO CONDUCT FUNERALS

1 ULPIAN, *Edict, book 10:* Anyone who spends something on a funeral is held to contract with the deceased, not with the heir.

2 ULPIAN, *Edict, book 25:* Aristo says that a place where a slave is buried is religious. 1. Anyone who carries a dead man (or has him carried) for burial to a place belonging to somebody else is liable to an *actio in factum.* "To a place belonging to another person" should be understood to denote either a piece of land or a building. But the clause gives the action to the owner, not to the possessor in good faith; for when the edict says, "to a place belonging to another person," it obviously refers to the owner, that is, the person whose place it is. A usufructuary too, if he performs a burial, will be liable to the owner of title. One can argue whether a partner is liable if he performs a burial without his partner's knowledge, but the better view is that an action for dividing an inheritance or for dividing common property lies against him. 2. The praetor says: "If a dead man or the bones of a dead man are alleged to have been carried for burial to an ordinary place belonging to another person or to a tomb in which the person has no right to bury," then the person who does this is liable to an *actio in factum,* and a fine will be imposed on him. 3. The praetor refers to "carrying" for the purposes of burial. 4. An "ordinary" place means one which is not sacred nor holy nor religious, but appears to be free from all such designations. 5. A tomb is

a place where a man's body or bones have been interred. Celsus, however, says: "Not all of the place chosen for a burial becomes religious, but only as much of it as covers the body." 6. A monument is something which exists to preserve a memory. 7. Someone with usufruct cannot make a place religious. On the other hand, if one man has the title, another the usufruct, not even the former can make the place religious, unless he happens to have buried the person who has bequeathed the usufruct, it not being possible to bury him so conveniently anywhere else; that is what Julian writes. Otherwise, the place cannot become religious against the wishes of the usufructuary; but if the usufructuary agrees, the better view is that the place does become religious. 8. If a place is under a servitude, nobody can make it religious without the agreement of the person to whom the servitude is owed. But if he can have the benefit of the servitude in some other place just as conveniently, the burial does not appear to be intended to obstruct the servitude, and so the place becomes religious; this is certainly reasonable. 9. If a man has given land as a pledge, and he buries one of his family there, he makes it religious. If he himself is buried there, the same applies. But he cannot grant the same right to somebody else.

3 PAUL, *Edict, book 27:* When everyone is in agreement, it is in the public interest to say that a place can be made religious; Pomponius writes that this is so.

4 ULPIAN, *Edict, book 25:* If the heir named in the will buries the deceased head of the household before accepting the inheritance, he makes the place religious, but nobody should think that in performing the burial he is acting as heir; for suppose he is still trying to decide whether to accept the inheritance. I think that even if it is not the heir who buries him, but somebody else, because the heir is delaying or is absent or is afraid of appearing to act as heir, the other person makes the place religious; for the dead are generally buried before anybody qualifies as their heir. But the place only becomes religious if it belonged to the deceased; for the place in which the dead man is buried seems naturally to belong to him, especially if he is buried in the place he chose himself. So much so that even if the heir buries him in a place that is left as a legacy, still through the burial of the testator the place becomes religious, provided that the burial could not have taken place somewhere else just as conveniently.

5 GAIUS, *Provincial Edict, book 19:* Tombs which a man sets up for himself and his household are called household tombs, those he sets up for himself and his heirs are called hereditary tombs,

6 ULPIAN, *Edict, book 25:* as is a tomb which the head of a household has acquired by right of inheritance. In each kind of tomb, his heirs and other successors of whatever sort may be buried and may bury their dead, even if they are heirs to a very small share by will or by intestacy and even without the consent of the other heirs. The same right is granted to children of either sex and of any degree, even [sons-in-power and] emancipated children whether they have qualified as heirs or have refused the inheritance. Unless the testator, acting out of reasonable ill-feeling, has specifically forbidden it, those who have been disinherited are allowed on compassionate grounds to be buried there themselves, but they may not bury anyone other than their own descendants. Freedmen can neither be buried nor bury others, unless they are heirs to their patron, although some people have inscribed on their tomb that they have built it for themselves and their freedmen; this view was given by Papinian, and there has often been a ruling to this effect. 1. If a tomb is still ordinary ground, it can be

sold or given away. If a cenotaph is built, one should rule that it can be sold; for a rescript of the deified brothers says that a cenotaph is not religious.

7 GAIUS, *Provincial Edict, book 19:* Anyone who carries a dead man for burial to a place belonging to somebody else is compelled by an *actio in factum* either to remove the body or to pay the price of the ground. This action lies both in favor of and against the heir and has no time limit. 1. The proconsul grants an *actio utilis in factum* against anyone who places a dead man in somebody else's stone coffin in which nobody has yet been buried; for it cannot strictly be said that the person has placed it either in a tomb or in a place belonging to somebody else.

8 ULPIAN, *Edict, book 25:* If someone has carried bones or a corpse for burial to a place belonging to somebody else, is the owner permitted to dig up or remove these remains without a decree by the priests or an order from the emperor? Labeo says he must wait to receive either the permission of the priests or the command of the emperor; otherwise, an action for insult will lie against the person who removes the remains. 1. If a religious place is alleged to have been sold as though it was ordinary, the praetor grants the person concerned an *actio in factum* against the seller. This action is also available against an heir, since it virtually includes an action on sale. 2. If someone carries a dead man for burial to a place designated for the use of the public, the praetor grants an action against him; if he did it fraudulently, he should be punished by extraordinary process, but the punishment should not be severe; if he did not, he should be acquitted. 3. In this action, the term "ordinary ground" must be extended to cover buildings. 4. This action is available not only to the owner but also to anyone who has usufruct of the place or a servitude attached to it; for these people too have the right to forbid a burial. 5. Anyone who has been prevented from carrying for burial to a place where he has a right to bury can have an *actio in factum* and an interdict, even if it is not he himself but his procurator who has been prevented; for he is regarded as having been prevented himself, in some sense.

9 GAIUS, *Provincial Edict, book 19:* Anyone who is prevented from carrying for burial the body or bones of a dead man is free either to obtain an interdict at once, forbidding the use of force against him, or to perform the burial elsewhere and afterward bring an *actio in factum.* By means of this action, the plaintiff wins damages to cover the cost to himself of being prevented from performing the burial as he wished; the calculation takes into account the cost of buying or renting another piece of ground or the value of his own ground which he would not have made religious had he not been forced to. So I wonder why it seems to be generally agreed that this action should not be granted either in favor of or against an heir; for it would appear that the action is based on the principle of financial compensation. Certainly, there is no time limit on the availability of the action to the original participants.

10 ULPIAN, *Edict, book 25:* If the seller of a farm specifies that a burial place should be available for him and his descendants to be buried there, if he is denied access for the purpose of carrying someone for burial, then he can bring an action. For the agreement between the purchaser and the seller is held to guarantee right of way through the farm for the purpose of performing a burial.

11 PAUL, *Edict, book 27:* But if the site of a monument is sold on condition that those who have a right to should not be buried there, a pact is not sufficient for the purpose, but provision must be made by means of a stipulation.

12 ULPIAN, *Edict, book 25:* If someone owns a burial place, but does not have a right of way to it, and he is denied access to it by his neighbor, a rescript of the Emperor Antoninus and his father says that the man can ask for right of way to the burial place as a *precarium,* and this should usually be given, so that whenever there is no legal right, the request for access may be granted by the owner of the adjacent farm. But this rescript, which enables one to obtain right of way on request, does not give the

right to a civil action as well; instead the governor should be approached by extraordinary process and should ensure that right of way is given in return for a fair price, though the judge must examine the suitability of the site, to make sure that the neighbor does not suffer great loss. 1. A *senatus consultum* provides that the right of use of a burial place should not be profaned by change of use, that is, that a burial place should not be used for some different purpose. 2. The praetor says: "Where expenses are incurred on a funeral, I shall give an action for recovering them against the person concerned." 3. This edict was issued for a good reason, so that someone who has arranged a funeral may sue for his expenses. This ensures that corpses are not left unburied and that nobody is buried at a stranger's expense. 4. The person who is appointed by the deceased ought to arrange the funeral. If he does not do so, he incurs no penalty, unless he has been left something as a reward for arranging it; in that case, if he has not complied with the wishes of the deceased, he is debarred from the reward. But if the deceased made no provision concerning his funeral and the job of arranging it has not been assigned to anybody else, then it falls to the heirs named in the will. If no heir is named, it falls to the *legitimi heredes* or the cognates in order of succession. 5. Funeral expenses are assessed according to the wealth or rank of the deceased. 6. The praetor or municipal magistrate should determine what should be spent on the funeral; if there is money in the inheritance, he should draw on it; if there is not, he should sell perishables whose retention is a burden on the inheritance, failing which, he should order any gold or silver to be sold or pledged, to provide the money.

13 GAIUS, *Provincial Edict, book 19:* Or he should get it from debtors, if it can readily be recovered.

14 ULPIAN, *Edict, book 25:* If anyone tries to obstruct the delivery of the goods to the purchaser, the praetor ought to intervene and ensure that the transaction can take place [if anything obstructs the delivery of the goods to the purchaser]. 1. If the deceased was a tenant farmer or lodger and there is no money to pay for his funeral, Pomponius writes that the funeral expenses should be met from his movable property, and if any surplus remains, that should be retained to cover any arrears of rent. Also, if the testator whose funeral is being arranged has left property as legacies, but there is no money to pay for the funeral expenses, that property should also be appropriated; for it is more important for a testator to be buried at his own expense than for people to receive legacies. Also, if an inheritance is only accepted later, the purchaser should not have the property he bought taken away from him, because he is possessor in good faith and has ownership, since he acquired the property under the authority of a judge. But a legatee should not be deprived of his legacy, if he can be protected by the heir; but if he cannot, it is better for the legatee not to gain than for the purchaser to suffer loss. 2. If a testator instructs someone to look after his funeral and the person receives the money, but does not hold the funeral, Mela has written that an action for fraud should be given against him. However, I think that the praetor, acting by extraordinary process, should compel him to hold the funeral. 3. The only expenses held to be incurred for the sake of a funeral are those [incurred, so that the funeral could be held] without which the funeral could not be conducted, for example, any payment for the carrying-out of the dead man; also, if there is any expenditure on the place to which the body is to be carried for burial, Labeo writes that this is held to be expenditure for the sake of the funeral, because it is essential to prepare a place for the burial of the body. 4. Expenditure on bringing home the body of someone who died abroad is part of funeral expenses, even if the funeral is not being held yet. The same goes for expenditure on guarding the body or even on entrusting it to someone else's protection or on arranging a marble monument or vestments. 5. But one ought not to bury ornaments and such like with the body, as the uneducated do. 6. This action, called the action for funeral expenses, is based on considerations of justice and fairness. It only covers expenses for the sake of a funeral, not other expenditure. What is fair in a particular case is understood to depend on the rank of the person being buried, the circumstances, the occasion, and also on good faith, so that no more should be charged than was actually spent, nor should the full amount be charged if the expenditure was excessive; for account should have been taken both of the resources of the person on whom the expense is incurred and of the estate which is unjustifiably

being used up to an excessive extent. So what if the expenditure was in accordance with the testator's wishes? We should be aware that his wishes are not to be obeyed if that means expenditure above the reasonable limit; rather, the expenditure should be commensurate with his resources. 7. But sometimes the person who has paid for the funeral does not recover his expenses, when he paid because of a sense of duty with no intention of recovering his outlay; this has been laid down in a rescript by our own emperor. So the arbitrator must assess and weigh up the motive for the incurring of expenditure; was the person acting as unauthorized agent for the deceased or the heir or for humanity itself, or was he moved by compassion, a sense of duty, or affection? We can distinguish degrees of compassion; that is, the person who arranged the funeral may have been compassionate or dutiful to the extent of burying the deceased in order to prevent him from remaining unburied, but not to the extent of doing so at his own expense. If that is how it appears to the judge, he should not absolve the defendant. For who can bury a corpse which is somebody else's responsibility without in some measure feeling a sense of duty? So one ought to declare before witnesses whom one is burying and with what motives, so that there will not have to be an investigation later. 8. When sons bury their parents or when other people bury someone to whom they could become heir, the burial itself does not create a presumption that they are behaving as heir or accepting the inheritance, yet nevertheless, lest *heredes necessarii* should appear to have involved themselves with the inheritance or other heirs should appear to have behaved as heirs, they generally declare before witnesses that they are performing the burial out of a sense of duty. If they make this declaration unnecessarily, they are held to be ensuring that they are not thought to have involved themselves with the inheritance, but not ensuring that they can recover their expenses, since they declare that they are acting out of a sense of duty. So in order to be able to recover their expenses as well, they must make a more detailed declaration. 9. Perhaps one can say that sometimes part of the expenses can be recovered, so that the person is regarded as partly acting as an unauthorized agent, as it were, partly acting out of a sense of duty. This is the better view. So the person will recover the portion of the expenses that he did not intend to donate himself. 10. The judge who is weighing up such considerations of equity should sometimes refuse to consider a low expenditure, if, say, it was intended as an insult to the deceased, who was a wealthy man; for he should not take any account of the expenditure when the person appears to have insulted the deceased by burying him in such a manner. 11. If someone buries the head of the household in the belief that he is heir, he cannot bring an action for funeral expenses, because he did not intend to act as unauthorized agent for somebody else; that is the opinion of Trebatius and Proculus. But I think he too should be granted an action for funeral expenses if there is good cause. 12. Labeo says that whenever someone can have another kind of action in respect of the recovery of funeral expenses, he cannot bring an action for funeral expenses; so if he can bring an action for dividing an inheritance, he should not bring an action for funeral expenses, though, of course, if there has already been an action for dividing an inheritance, he can bring the other action. 13. Labeo also says that if you bury a testator even though the heir forbids it, an action for funeral expenses is available to you if good reason is shown; for what if the heir forbade the testator's son? In reply it can be said: "So you buried him out of a sense of duty." But suppose I make a declaration before witnesses; then, Labeo says, I can have an action for funeral expenses; for it is best for the dead to be buried at their own expense. And what if the testator has instructed me by mandate to bury him, the heir forbids me to do so, but I nevertheless bury him? Is it not fair that an action for funeral expenses should be available to me? In general, I think the just judge should not simply follow the procedure of the action for unauthorized administration, but should seek an equitable decision along more liberal lines, since the nature of the action allows him this freedom. 14. However, the deified Marcus laid down in a rescript that it is wrong for an heir to prevent the person appointed by the testator from performing the burial, though there is no statutory penalty for the offense. 15. If someone has arranged a burial on somebody else's mandate, he cannot have an action for funeral expenses, but, of course, the mandator can whether he has paid the money to the person to whom he gave the mandate or he still owes it to him.

But if a *pupillus* gave the mandate without his tutor's authority, an *actio utilis* for funeral expenses against the heir should be given to the person who paid for the funeral, since it would be unfair for the heir to be better off as a result. If, however, a *pupillus*, without his tutor's authority, gave a mandate concerning a funeral which is his responsibility, then I think that an action should be granted against him, if he has qualified as heir to the man who was buried, and if the inheritance is solvent. On the other hand, if someone has arranged a funeral on the mandate of the heir, Labeo writes that he cannot bring an action for funeral expenses, because he can have an action on mandate. 16. But if he was acting as an unauthorized agent for the heir when he held the burial, even if the burial is not ratified by the heir, Labeo writes that he can still bring an action for funeral expenses. 17. This action is granted against those who are responsible for the funeral, for example, against the heir or *bonorum possessor* and against other successors.

15 POMPONIUS, *Sabinus, book 5:* Funeral expenses should also be paid by a patron who is seeking *bonorum possessio* contrary to the will.

16 ULPIAN, *Edict, book 25:* The praetor grants an action for funeral expenses against anyone who has received something by way of a dowry. For the early lawyers thought it only fair that the funerals of women should be paid for from their dowries, as though from their estates, and that anyone who gained the dowry on a woman's death, whether her father or her husband, should contribute to her funeral expenses.

17 PAPINIAN, *Replies, book 3:* But if the father has not yet recovered the dowry, the husband alone is sued and then charges to the father what he has paid out on the funeral.

18 JULIAN, *Digest, book 10:* For funeral expenses are a debt incurred by the dowry.

19 ULPIAN, *Sabinus, book 15:* And so the dowry should meet this debt.

20 ULPIAN, *Edict, book 25:* Suppose someone has given a dowry for a woman, stipulating that two thirds should be returned to him, and one third should remain with the husband; and suppose he has made a pact to the effect that the husband should not contribute to the funeral; Neratius asks whether the husband is liable to an action for funeral expenses. He says that if the stipulator himself buries the woman, the pact comes into force and the action will be of no use to him; but if somebody else buries her, he can sue the husband, because the pact cannot override the civil law. But what if someone has given a dowry for a woman on condition that it returns to him if she dies while still married or if the marriage is dissolved in any way? Surely, he should not escape contributing to the funeral. But since the dowry reverts to him, it can be said that he should contribute. 1. If the husband gains the dowry, he and not the father should be sued for funeral expenses. But in this case if the dowry is a very small one and so is not enough to pay for the funeral, then I think an action should be given against the father for the balance. 2. When the mistress of the household has died and her inheritance is insolvent, her funeral expenses should be paid from her dowry alone; that is what we read in Celsus.

21 PAUL, *Edict, book 27:* Where the person who has been buried was in his father's power, an action for funeral expenses is available against the father, according to his rank and wealth.

22 ULPIAN, *Edict, book 25:* Celsus writes that when a woman dies, her funeral expenses should be paid from the dowry which remains with the husband and from the woman's other property in the due proportions.

23 PAUL, *Edict, book 27:* For example, if the dowry is worth one hundred, the inheritance two hundred, the heir will pay two thirds, the husband one third.

24 ULPIAN, *Edict, book 25:* Julian writes that before deductions for legacies

25 PAUL, *Edict, book 27:* or for the cost of manumissions

26 POMPONIUS, *Sabinus, book 15:* or for debts,

27 ULPIAN, *Edict, book 25:* both the husband and the heir should contribute proportionately to the funeral. 1. The husband cannot be sued for funeral expenses if he repaid the dowry to the woman during the marriage; so we read in Marcellus, and this view is correct, at least in those cases where statute permits the husband to do this. 2. Furthermore, I think that in the action for funeral expenses, the husband is only liable to pay as much as he can afford; for he appears to be better off by the amount that he would have handed over to his wife if she had sued him.

28 POMPONIUS, *Sabinus, book 15:* But if there was no dowry, then Atilicinus says that the father ought to pay all the expenses, or else the woman's heirs, supposing she is emancipated. But if she has no heirs and her father is insolvent, the husband should be sued for as much as he can afford, so that it may never appear that his wife was left unburied through his misconduct.

29 GAIUS, *Provincial Edict, book 19:* If a woman who has been divorced and has remarried dies, Fulcinius does not think her former husband should pay the funeral expenses, even if he has gained the dowry. 1. If someone has buried a daughter-in-power he has the right to sue the husband until the dowry is returned to the father; after it has returned, the father is answerable to him. Of course, if the husband has been sued, he will deduct the amount from the dowry before returning it to his wife's father.

30 POMPONIUS, *Sabinus, book 15:* On the other hand, if the father has spent money on his daughter's funeral or has handed money over when sued for funeral expenses, he can recover it from the husband in an action for the dowry. 1. But if an emanicipated woman dies while married, the heirs or those with *bonorum possessio* should contribute; so should the father according to the proportion of the dowry that he gets back, and so should the husband according to the proportion of the dowry that he keeps for himself.

31 ULPIAN, *Edict, book 25:* If a son-in-power is a soldier and has a military *peculium*, I think his successors are liable in the first instance and then his father. 1. If someone has buried somebody else's male or female slave, he can have an action for funeral expenses against the owner. 2. This action is not limited to a year after the event, but has no time limit, and it is granted in favor of an heir and other successors and against successors.

32 PAUL, *Edict, book 27:* If someone who has possession of an inheritance holds a funeral but loses his claim and hands over the inheritance without deducting his expenses on the funeral, then he can have an *actio utilis* for funeral expenses. 1. If a husband and wife die at the same moment, Labeo says this action should be given against the husband's heir according to the proportion of the dowry which he receives, since this liability goes with the dowry which has passed on to him.

33 ULPIAN, *Edict, book 68:* If somebody was heir but then the inheritance was taken away from him on the grounds of his unworthiness, the better view is that he retains his rights relating to the inherited burial places.

34 PAUL, *Edict, book 64:* If a piece of ground is left as a conditional legacy and the heir buries a dead man there while the condition is pending, he does not make the place religious.

35 MARCELLUS, *Digest, book 5:* Our ancestors thought there was no need to mourn a man who set out to destroy his country and to kill his parents and children. They all decided that if such a man was killed by his son or father, it was no crime, and the killer should even receive a reward.

36 POMPONIUS, *Quintus Mucius, book 26:* When a place is captured by an enemy, it always ceases to be religious or sacred (just as freemen become slaves in the circumstances); but if the place is rescued from this unfortunate state, it returns, as it were, by a sort of *postliminium* and is restored to its former state.

37 MACER, *Law of Death Duties, book 1:* Funeral expenses are generally held to include any expenditure on the body (for example, on ointments), the cost of the place where the deceased is buried, and any rent which has to be paid, or the cost of the sarcophagus and the cost of transporting the body. I consider that anything spent on the body prior to burial is also part of funeral expenses. 1. The deified Hadrian said in a

rescript that a funerary monument is something built as a monument, that is, as a protection for the place where the body is interred. So if the testator has ordered the building of a large structure, for example, something with colonnades all round, that is not expenditure incurred on the funeral.

38 ULPIAN, *All Seats of Judgment, book 9:* It is the duty of the provincial governor to ensure that the bodies or bones of the dead are not detained or interfered with and that nobody prevents them from being transported on a public road or from being buried.

39 MARCIAN, *Institutes, book 3:* The deified brothers issued an edict warning that a corpse which has received a lawful burial, that is, which has been interred, is not to be disturbed. A corpse is deemed to have been interred if it has been put in a sarcophagus with the intention that it should not be removed from it and transferred elsewhere. But there is no reason to deny that if circumstances demand, the sarcophagus itself may be transferred to a more suitable place.

40 PAUL, *Questions, book 3:* For if someone has carried a body somewhere, intending to transfer it elsewhere later, and to leave it where it is only for the time being (rather than meaning to bury the dead man there and to give him an eternal resting place, as it were), then the place remains profane.

41 CALLISTRATUS, *Institutes, book 2:* If there are several owners of a place to which a dead man is being carried for burial, they must all give their consent when strangers are being buried; for it is agreed that any of the owners themselves can lawfully be buried there, even without the consent of the others, especially when there is nowhere else for him to be buried.

42 FLORENTINUS, *Institutes, book 7:* In general, a monument is something left as a memorial for posterity; if a corpse or remains are placed in it, it becomes a tomb; otherwise, it is a memorial monument, which the Greeks call a cenotaph.

43 PAPINIAN, *Questions, book 8:* There are persons who, although they cannot make a place religious, nevertheless are entitled to seek an interdict concerning the carrying of a dead man for burial there, for example, if the holder of the title carries or wishes to carry a dead man for burial to a farm whose fruits belong to somebody else. If he does thus carry the body, he will not be performing a lawful burial, but if he is prevented, he is entitled to seek an interdict, as a result of which there will be an inquiry into the rights of ownership. The same applies to a partner who wants to carry a dead man for burial to a common farm against the wishes of the other partner. For in the public interest, in order that corpses should not lie unburied, we ignore the strict principle, which is quite often left out of account in doubtful religious disputes, because the highest principle of all is that which serves the interests of religion.

44 PAUL, *Questions, book 3:* When a burial has been performed in more than one place, the places are not both made religious, because one burial cannot produce more than one tomb. In my opinion, the place which is religious is the one where the most important part of us is buried, that is, the head from which likenesses are made, by which we are recognized. But when a request for the transfer of the remains is granted, the place ceases to be religious.

45 MAECIANUS, *Fideicommissa, book 8:* Funeral expenses are always deducted from the inheritance; when the estate is insolvent, they take precedence over all the debts.

46 SCAEVOLA, *Questions, book 2:* If someone possessed several farms and left the usufruct of each in separate legacies, he can be buried in one of them; the choice is the heir's, and in making it he can show favor. But the usufructuary should be given an *actio utilis* against the heir to get compensation for the reduction in the value of the usufruct resulting from his being chosen. 1. If the heir to a woman buries her on a farm which is part of the inheritance, he should recover a sum corresponding to the value of the burial place from the husband, if he ought to contribute to the funeral.

2. It is generally held that if clothing left to somebody as a legacy is used in the burial, he should be given an *actio utilis* against the heir, and a prior claim on the inheritance to cover what he has spent on the funeral.

8

BURYING THE DEAD AND BUILDING TOMBS

1 ULPIAN, *Edict, book 68:* The praetor says: "I forbid you to use force to prevent this person from being able to carry a dead man for burial to any place or by any route and bury him there, if he has a right to carry a dead man for burial to that place or by that route against your wishes." 1. Anyone who has a right to carry a dead man for burial is not to be prevented from carrying him; he is held to be prevented from carrying him if he is prevented from carrying him to the place or if he is stopped from approaching the place. 2. This interdict is available to the owner of the title in connection with burial of the dead; it is also available in connection with ordinary ground. 3. Similarly, if I have right of way to land to which I wish to carry a dead man for burial and I am prevented from having access, it is established that I can pursue my right by this interdict, because in being prevented from exercising my right of way, I am being prevented from carrying the dead man for burial; and the same procedure should also be approved if I have any other servitude. 4. It is obvious that this is a prohibitory interdict. 5. The praetor says: "I forbid you to use force to prevent this person from being able to build a tomb in good faith in any place if he has a right to carry a dead man for burial to that place." 6. This interdict has been issued because it is in the interests of religion that funeral monuments be built and ornamented. 7. Nobody is prevented from building a tomb or monument where he has a right to. 8. A man is also held to prevent another from building if he prevents the transportation of the necessary building materials. Likewise, too, if someone prevents the men necessary for the job from having access, the interdict applies, as it also does if someone prevents machinery from being fixed in position, provided he does this in a place which is under a servitude; but if you want to set up your machinery on my ground, and I am within my rights in refusing you permission, I am not liable to an interdict. 9. It is to be understood that a man is building not only when he puts up a new structure but also when he wishes to repair an existing one. 10. A man through whose actions a tomb falls down is liable to this interdict.

2 MARCELLUS, *Digest, book 28:* The law of the kings forbids burial of a woman who died pregnant until her offspring has been excised from her body; anyone who does otherwise is held to have destroyed the prospects of the offspring being alive when he buried the pregnant mother.

3 POMPONIUS, *Sabinus, book 9:* If someone is building a tomb too close to your house, you can serve notice that he should not proceed with the new structure; but once the building is completed the only action available to you is one against force or stealth. 1. If a dead man has been buried too close to someone else's building within the minimum interval laid down by statute, the owner of the building cannot subsequently prevent the same person from burying another body or building a monument there, if that person acted with the owner's knowledge in the first place.

4 ULPIAN, *Replies, book 2:* A man does not acquire burial rights by long possession if he is not legally entitled to them.

5 ULPIAN, *Opinions, book 1:* If a man's remains have been buried in a monument which is said to be incomplete, nothing prevents it from being completed. 1. But if the place has already become religious, the priests must establish how far the need to put the structure in proper shape can be met without offending against religion.

BOOK TWELVE

1

THINGS CREDITED GIVING RISE TO FIXED CLAIMS AND THE *CONDICTIO*

1 ULPIAN, *Edict, book 26:* Before we get to the interpretation of the edict's words, something ought to be said of the meaning of the rubric itself. 1. It was because he wanted to include a good deal of law relating to differing contracts that the praetor chose the rubric "things credited," because that embraces all contracts entered in reliance on the faith of another. For, as Celsus says in the first book of his *Questions*, "credit" is a general term. Hence, the praetor put the edicts on both loan for use and pledge under this rubric. In fact, whenever we agree to something in reliance on the faith of another on the basis that we shall soon receive back something in return, we are said to give credit under the contract in question. The word "thing" was also chosen by the praetor for its generality.

2 PAUL, *Edict, book 28:* In the case of loan for consumption, we do not expect to get back the very thing given (then it would be loan for use or deposit) but rather something of the same kind. If ever we expect back something of another kind, as, for instance, wine for corn, the transaction will not be loan for consumption. 1. This kind of lending happens in relation to those things which are dealt in by weight, number, or measure. For the giving of those things makes us generic creditors, since the very way in which they are used requires generic rather than specific repayment. But in the case of other things, we cannot become generic creditors, for the reason that without the creditor's consent one thing cannot be given in discharge for another. 2. The word for loan for consumption, *mutuum*, is formed from *meum* and *tuum*, because what is mine becomes yours. Hence, if it does not become yours, the obligation does not arise. 3. Credit differs from loan for consumption as genus from species. There can be a credit of things other than those dealt in by weight, number, or measure. So, for instance, there is a credit when we expect back the very thing given. Again, there cannot be a loan for consumption unless value passes, whereas a credit sometimes happens even though nothing passes, as where after a marriage a dowry is promised. 4. The person giving a loan for consumption must be the owner; and that is not contradicted by the fact that sons-in-power and slaves raise the obligation by lending coins from their *peculium*; for that is the same kind of case as where you give money at my behest; then the action accrues to me, though the coins were not mine. 5. We also become creditors by word of mouth by using a form which creates obligations, as, for instance, stipulation.

3 POMPONIUS, *Sabinus, book 27:* Even if there is no provision in a loan for consumption that the thing returned should be of the same quality, the debtor is not allowed to give back some thing which, though of the same kind, is of inferior quality, for example, new wine for old. The reason is that when a contract is made, the nature of the transaction is given effect just as though expressly provided for; and the nature of this one is taken to be that the thing paid back must be of the same kind and quality as the thing given.

4 ULPIAN, *Sabinus, book 34:* Suppose a man who has no reason or plan to put money out at interest. You are going to buy an estate. You ask for money by way of loan for consumption

but you do not want to take the money as credited to you until you make the purchase. The creditor, perhaps because he has to set off on a journey, therefore deposits the money with you on the basis that only if you buy, do you come under an obligation as for money credited to you. Now, you take that deposit at your own risk. For one who receives something to be sold with the term that he may himself use the price also holds the thing at his own risk. 1. A thing which has been given as a pledge can be made the subject of a *condictio* once the money has been paid. The same is true of fruits gathered under an unlawful cause. In the case even of a tenant who gathers fruits after his term has ended, it is agreed that the *condictio* lies, at least where the gathering is done contrary to the will of the owner. If it is done in accordance with his wishes, then, of course, the *condictio* cannot be brought. 2. Things swept in by the force of rivers can be the subject of a *condictio*.

5 POMPONIUS, *Sabinus, book 22:* Something which you are under a civil law duty to convey to me comes to grief. The disaster happens after you have been prevented from making the conveyance by events for which you yourself are responsible. It is agreed that the loss lies on you. But in determining whether the events in question were your responsibility, account must be taken not only of whether the thing was within your control or not and whether you did anything dishonest to prevent its being or coming under your control but also whether there was any just cause why you ought to have realized that you were under the duty to convey it.

6 PAUL, *Edict, book 28:* There is a fixed claim when the identity or quantity of the subject matter of the obligation is indicated by a name or the quality and quantity are shown by a description which substitutes for a name. Thus Pedius says in the first book of his *Stipulations* that it does not matter at all whether a thing is called by its name, pointed out with a finger, or described in words; for whatever achieves the object serves the turn.

7 ULPIAN, *Edict, book 26:* All terms which can be attached to stipulations can also be added to a payment of money. That applies to conditions as well.

8 POMPONIUS, *From Plautius, book 6:* In the same way, a loan for consumption is sometimes suspended against confirmation by a subsequent event. For example, I may give you coins by way of such a loan, subject to a condition on the fulfillment of which they will become yours and you will come under an obligation to me. Again, if an heir advances the money in a legacy and then the legatee decides to have nothing to do with it, the heir can sue as for money credited, because the coins are understood to belong to the heir from the moment of his entry upon the inheritance. For Julian holds that deliveries made by an heir are related back to the time at which the inheritance was entered whether the legacy be repudiated or taken up.

9 ULPIAN, *Edict, book 26:* The *condictio* for a fixed claim is available for all fixed claims arising on whatever cause or obligation; and it does not matter whether the content of a contract on which the claim is based is itself fixed or unfixed; for we are allowed to use the *condictio* to make fixed claims under every kind of contract, provided the obligation is immediate. But so long as the obligation is suspended until a time or against a condition I shall not be able to bring a *condictio*. 1. This action also lies on account of legacies and under the *lex Aquilia*; and another cause for bringing an action by way of *condictio* is theft. Again, one wishing to claim under a *senatus consultum* can have this action, as, for instance, should he want to sue, the person to whom a fiduciary inheritance has been restored. 2. Nor does it matter whether the defendant is under an obligation on his own account or on account of another; for in either case this action is rightly brought. 3. Since this *condictio* for a fixed claim lies under all contracts whether concluded by conduct or by words or part and part, something ought to be said of a few specially noteworthy types which raise the question whether this action suits the claim. 4. I paid you ten and made you promise by stipulation to give them to a third party. The stipulation is void. Two contracts thus coincide, one concluded by conduct (that is, by the payment) and one by words (albeit void on the ground that stipulations cannot be made in favor of third parties). In that state of affairs, can I claim the ten by this action by way of *condictio*? I think, yes.

5. Similarly, where I take a stipulation from a *pupillus* without his tutor's authority after having made an advance to him with the tutor's authority, there too the *condictio* based on the payment survives for me. 6. Again, suppose I make a payment to you and take a stipulation for it from you, but subject to an impossible condition. The stipulation being void, the *condictio* once more survives. 7. Or suppose again that I make a payment to one who then comes under an interdict from possessions, and soon after that, I take a stipulation from him. I think his case is to be compared with that of the *pupillus*; for both can take valid stipulations in their own favor. 8. Where in your absence and without your knowledge I give my coins as though they were yours, Aristo writes that the *condictio* accrues to you. The same question was put to Julian, and he writes in the tenth book that Aristo's opinion is correct, adding that there is no doubt in the case in which it is in accordance with your wishes that I pay out my money for you that the obligation accrues to you; for it happens daily that when we are about to lend out money we approach another for a loan for ourselves on the basis that our creditor shall make the payment on our account directly to our future debtor. 9. I made a deposit with you of ten. Later I allowed you to use them. Nerva and Proculus hold that even before they are moved a *condictio* lies for them as upon a loan for consumption and that is correct, as Marcellus also finds, because the intention initiates possession. Hence, the risk passes to him who sought the loan for consumption, and the *condictio* lies against him.

10 ULPIAN, *Edict, book 2:* On the other hand, if from the beginning of the deposit I say you may use it if you want to, then because it is not certain whether there will be any indebtedness the credit does not happen until the money is moved.

11 ULPIAN, *Edict, book 26:* You ask me to lend you money. Having none available, I give you a plate or a bar of gold to sell and use the proceeds. Once you sell, I think a loan for consumption has been made of the money. But suppose you lose the plate or bar before the sale without fault on your part. Does the loss fall on you or me? I think Nerva draws exactly the right distinction. He says it all depends on whether or not I had the plate or bar up for sale. If yes, the loss falls on me, just as if I handed them over to another to be sold. On the other hand, if I did not plan to sell but was moved to do so only to enable you to use the proceeds, the loss is yours—and all the more so if the loan is interest free. 1. If I give you ten on the understanding that you shall owe nine, Proculus holds and rightly that the automatic conclusion of law is that you owe no more than nine. But if the understanding is that you shall owe eleven, Proculus's opinion is that the *condictio* will not go for more than ten. 2. If a fugitive slave advances money to you, can his owner bring a *condictio* against you? Certainly, a slave of mine with licence to administer his *peculium* will make a valid loan for consumption by lending to you; but in the case of a loan made by a fugitive or by another slave acting against his master's will, the property in the coins will not pass to the recipient. What is the result? The coins can be vindicated if they still survive, or an action for production can be brought if they have ceased to be possessed through fraud; if without fraud you have used them up, I can bring a *condictio* against you.

12 POMPONIUS, *From Plautius, book 6:* You received money on loan for consumption from a lunatic whom you thought to be sane and applied it to your own benefit. Julian holds that the lunatic can bring the *condictio,* since all causes which can give rise to actions in our favor without our knowledge also operate in favor of lunatics. Again, where one who has given credit to a slave goes mad, and then the slave applies the money to his master's benefit, the *condictio* can be brought in the name of the lunatic. Suppose again that someone gives a loan of money which belongs to another. He then goes mad, and the money is used up. Even in his lunacy the *condictio* is his.

13 ULPIAN, *Edict, book 26:* For even in the case of a thief who pays over coins to you with the intention of making a loan, though no property in the coins passes, yet once

5. Similarly, where I take a stipulation from a *pupillus* without his tutor's authority after having made an advance to him with the tutor's authority, there too the *condictio* based on the payment survives for me. 6. Again, suppose I make a payment to you and take a stipulation for it from you, but subject to an impossible condition. The stipulation being void, the *condictio* once more survives. 7. Or suppose again that I make a payment to one who then comes under an interdict from possessions, and soon after that, I take a stipulation from him. I think his case is to be compared with that of the *pupillus*; for both can take valid stipulations in their own favor. 8. Where in your absence and without your knowledge I give my coins as though they were yours, Aristo writes that the *condictio* accrues to you. The same question was put to Julian, and he writes in the tenth book that Aristo's opinion is correct, adding that there is no doubt in the case in which it is in accordance with your wishes that I pay out my money for you that the obligation accrues to you; for it happens daily that when we are about to lend out money we approach another for a loan for ourselves on the basis that our creditor shall make the payment on our account directly to our future debtor. 9. I made a deposit with you of ten. Later I allowed you to use them. Nerva and Proculus hold that even before they are moved a *condictio* lies for them as upon a loan for consumption and that is correct, as Marcellus also finds, because the intention initiates possession. Hence, the risk passes to him who sought the loan for consumption, and the *condictio* lies against him.

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loan or repayment. Once the money is used up, he gets his *condictio* or his discharge, as the case may be. The explanation is just that the money is recognized as reaching the recipient because of the ward's conduct. Hence, if the recipient of the loan or repayment uses the same money to lend to or repay another, then, the money being consumed, he both incurs an obligation to the ward (or perfects the ward's discharge from himself) and imposes an obligation upon his payee (or obtains his discharge from him). For it is an invariable rule that one who makes a loan using money which belongs to another puts his payee under an obligation from the moment the money is used up. Similarly, one who pays to obtain discharge achieves his release from his payee.

20 JULIAN, *Digest, book 18:* I give you money in return for your lending it back to me. Is that a valid loan? I said that in such propositions our use of language is inexact; for such a transaction is neither gift nor money lent—not gift, because the giver's intention was not that the money should remain at all events at the disposal of the donee; not loan, because given more to exonerate than to obligate the other. Hence, if one who has received money under this condition of lending it back again does actually pay it out, the result will not be a valid loan. But these conclusions are reached by logic-chopping. It is better to uphold both parts of the transaction.

21 JULIAN, *Digest, book 48:* Some think that one who claims ten cannot be compelled to take five and sue for the balance and similarly that one who says that an estate is his cannot be forced to limit the issue to half of it. Yet in each case, the praetor is to be commended for his humanity if he compels the plaintiff to take what he is offered, it being part of his duty to reduce litigation.

22 JULIAN, *From Minicius, book 4:* Wine which had been given on loan for consumption was claimed before a judge. To what time should its valuation relate: the making of the loan, joinder of issue, or judgment? Sabinus gave the opinion that if a time was specified for return of the loan, the value at that time should be taken; if not, the value at the time the demand was made. I asked what place's price should be followed. He answered that the value at the place specified for return of the loan should be taken, and if none was specified, the value at the place where the demand was made.

23 AFRICANUS, *Questions, book 2:* I possess and sell a slave as though bequeathed to me when he was actually bequeathed to you. Julian holds that if he dies, you can bring a *condictio* against me for his price, as on the ground of my enrichment from your property.

24 ULPIAN, *Pandects, sole book:* If you take a stipulation for a fixed thing or amount, you do not have the action on stipulation but ought to pursue your claim by that action in the *condictio* family which is used for demanding fixed things and amounts.

25 ULPIAN, *Duty of Consulars, sole book:* A creditor who advances money in respect of the restoration of buildings shall have in relation to that money so advanced a specially privileged claim.

26 ULPIAN, *Opinions, book 5:* A soldier's procurator lends his money for consumption and accepts a verbal guarantor. It has been held that the action is to be given to the soldier whose money it was. This follows the example of the case in which a tutor of a *pupillus* or curator of a youth takes a stipulation in respect of the ward's money which has been lent out.

27 ULPIAN, *Edict, book 10:* A *civitas* can be bound by a loan for consumption, so long as the money is applied to its advantage. Otherwise, the persons who made the contract will be bound, not the *civitas*.

28 GAIUS, *Provincial Edict, book 21:* A creditor who has taken an insufficient pledge

is not thereby deprived of his demand for the part of the debt which the pledge does not cover.

29 PAUL, *Plautius, book 4:* Julian says that an owner who uses a slave as a manager is also exposed to the *condictio* on the ground that the manager deals on the authority of the person who put him in.

30 PAUL, *Plautius, book 5:* One who makes a formal promise to his future creditor to repay a loan of money which he is about to receive has it in his power to escape liability by not taking the loan.

31 PAUL, *Plautius, book 17:* When land or a slave is claimed by *condictio*, I think the law we use is that once the issue goes for trial the measure of recovery is "whole cause," that is to say, everything the plaintiff would have had if payment had been made at the time of joinder of issue. 1. In ignorance and good faith, I buy your slave from a thief. He from his *peculium*, which belongs to you, buys a man who is then delivered to me. Sabinus and Cassius hold that you have a *condictio* against me for the man. In my turn, I can maintain an action against you if I am out of pocket on business done by the slave; and that is right; for Julian also says that we must consider whether the owner's right of action on the sale is not left unaffected, while the seller can bring the *condictio* against the possessor in good faith. So far as concerns the coins of the *peculium* the master of the slave can vindicate them if they still survive, but he is liable by action on the *peculium* to pay the seller the price. If they have been used up, the action on the *peculium* lapses. But Julian ought to have added that the seller could only be liable to the master of the slave's action on the sale if the master paid him the whole price and whatever else would have been owed if the contract had been made with a free man. The same should be said if I pay the possessor in good faith, so long as I am prepared to make over any actions I have against him to the master of the slave.

32 CELSUS, *Digest, book 5:* You asked for a loan of money from both myself and Titius, and I told my debtor to make a promise to you. You took a stipulation from him thinking him to be the debtor of Titius. Are you under an obligation to me? My position remains unchanged if, indeed, you have contracted no transaction with me; but it is nearer the mark to suppose that you are under an obligation to me, not because I have lent you money (that can only happen between parties who are agreed) but because my money has come into your hands and it is right and fair that you should give it back.

33 MODESTINUS, *Pandects, book 10:* It is laid down by imperial constitutions that those who govern a province and those around them must not engage in trade, make loans of money, or invest at interest.

34 PAUL, *Views, book 2:* The officials of a provincial governor, because they are permanent, are allowed to make loans of money and earn interest on capital. A provincial governor is not forbidden to borrow money at interest.

35 MODESTINUS, *Replies, book 3:* The risk in respect of accounting entries lies on the person by whose fault they can be shown to have been damaged.

36 JAVOLENUS, *Letters, book 1:* You owed me money unconditionally, and on my authority you promised it to Attius conditionally. While the condition remains outstanding, the position of your obligation to me is as though you had made a formal promise to me subject to a condition expressed in terms opposite to that of Attius. In the light of this, will I achieve nothing if I claim before the condition is resolved? I have no doubt but that even while the condition personal to Attius who took a conditional stipulation for this same money with my consent still remains unresolved, my money for which I

myself took an unconditional stipulation remains validly credited (it is just as if there had been no stipulation at all). However, until the fate of the condition is decided, I cannot claim, because I am considered to be suing before time so long as the question remains open whether the stipulation will give rise to any debt.

37 PAPINIAN, *Definitions, book 1:* When a condition relates to the present time, a stipulation is not suspended, and if the condition is true, the stipulation binds, even though the contracting parties do not know its result. An example is: "Do you promise to give one hundred if the king of the Parthians is alive?" The same considerations apply when a condition relates to time past.

38 SCAEVOLA, *Questions, book 1:* For the question to be asked is whether, using all humanly available means of knowledge, it is possible to know that the debt must fall due.

39 PAPINIAN, *Definitions, book 1:* Hence, the effect of conditions is really felt when they relate to the future.

40 PAUL, *Questions, book 3:* A *cautio* of this kind was read at a hearing before Aemilius Papinian, praetorian prefect and jurist: "I, Lucius Titius, have written that I have received from Publius Maevius fifteen [aurei] paid to me from his home as a loan for consumption. These fifteen are to be given in best coin on the first of next month; for this, Publius Maevius has stipulated, and I, Lucius Titius, have promised. If on the day above written the sum has not been paid and given to Publius Maevius or to him to whom the matter shall then belong or no satisfaction has been made on its account, then, for as long as I thereafter take to pay, for every thirty days one denarius for every hundred shall be paid by way of penalty; for this, Publius Maevius has stipulated, and I, Lucius Titius, have promised. Further, it is agreed between us in Maevius's interest that to the amount above written I shall be bound to pay, in reduction of the whole sum and either to Maevius or to his heir, monthly installments of three hundred denarii." The question arose as to the obligation in respect of interest, since the number of months during which payment could be made had gone past. I said that because contemporaneous pacts are deemed to be incorporated in stipulations, it was exactly as though he had stipulated for a certain sum of money for each month and added interest for late payment of those installments. Hence, at the end of the first month, interest on the first payment began to run, and similarly after the second and third periods, the interest on the unpaid money began to arise, interest on any installment of capital not being claimable until the installment of capital could itself be claimed. However, some argued that the pact added at the end related only to the payment of capital, not also interest. On this view, interest was dealt with once and for all in the body of the stipulation. They also argued that the pact only provided a defense, so that, the money not having been paid by the prescribed installments, interest was owed from the day specified in the stipulation just as if that had been expressly said. But since the time for payment of capital has been postponed, the consequence is that interest also only attaches from the time when he fell into delay. And if, as he [Papinian] thought, the pact gave rise only to a defense (though the opposite opinion prevailed) yet the obligation to pay interest is not automatically triggered by operation of law; for there is no delay so long as a defense obstructs a claim for the money. We do stipulate, when a condition is to be fulfilled, for the quantity being collected in the meantime. This happens in the case of fruits, and it can be carried over to the case of interest for which it is possible to provide expressly that if money is not paid by the permitted day, the provision in respect of interest shall operate from the day the stipulation was made.

41 AFRICANUS, *Questions, book 8:* Out in a province a moneylender put a slave, Stichus, in charge of his account book, and then, when his will was read at Rome, it turned out that Stichus was made free and, as to part, his heir. Unaware of his status, Stichus called in and lent out the dead man's money, sometimes taking stipulations and receiving pledges. A question was asked as to the law on these facts. The decision was

that the debtors who had paid him were discharged so long as they themselves had been unaware of his master's death. However, the claims of the co-heirs in respect of those sums which had come into Stichus's hands was maintainable, not by the action for division of an inheritance, but by the action for unauthorized administration. As for the money he himself had lent out, no property in it had passed larger than his own share in the estate; for even if I give you coins for the very purpose of your lending them to Stichus and then I die and you hand them over in ignorance of my death, the property in the coins does not pass to the recipient. For the holding that debtors who paid him were released did not entail the further proposition that he validly alienated the coins he lent out. Hence, in the absence of a stipulation a co-heir could not, according to his share, make a claim as for money lent, and the pledges were not binding. If there was also a stipulation, much depended on its form. If he had stipulated expressly for a render to Titius, his dead master, it was beyond doubt that the stipulation was void, but if he had stipulated for a render to himself, it ought to be held that he had acquired an asset for the estate; for just as assets accrue to us which are produced from our property by those who serve us in good faith, whether freemen or slaves belonging to others, so also assets made by use of the property of an inheritance accrue to the inheritance. After acceptance of the inheritance by the co-heirs, the same cannot fairly be said, not at least if they knew he had been made co-heir with them. In that case, it is not possible to see them as possessors in good faith, and, besides, they would have no intention to possess. But if one supposes the co-heirs to have been unaware of the fact, because they perhaps were themselves also *heredes necessarii*, then it is still possible to maintain the same opinion. Indeed what will happen in that case is that if Stichus's co-heirs are of the same condition as himself, all will be understood to be in *bona fide* service to each other.

42 CELSUS, *Digest, book 6:* I take a stipulation for ten from Titius and then one from Seius for whatever I cannot obtain from Titius. If I sue Titius for ten, Seius is not released; for otherwise his undertaking is no use at all. However, if Titius satisfies the judgment, Seius is liable no further. Suppose I sue Seius. Once issue is joined between him and me, whatever is the sum which at that time I have been unable to obtain from Titius, then for that sum I shall never afterward be able to make a claim on Titius.
1. Labeo holds that where you have taken a stipulation from one that he shall procure the giving of ten you cannot contend that he is bound to give you ten for the reason that the promissor can discharge himself by providing a wealthier person to be liable. By this, he certainly means that he cannot be compelled to join issue if he makes a solvent person available to be liable.

2

VOLUNTARY, COMPULSORY, AND JUDICIAL OATHS

1 GAIUS, *Provincial Edict, book 5:* Conscientious oath-taking is relied on as an important means of shortening litigation. Disputes are settled in this way by virtue of agreement between litigants or on the authority of the judge.

2 PAUL, *Edict, book 18:* The taking of an oath is a species of settlement and has greater authority than *res judicata.*

3 ULPIAN, *Edict, book 22:* The praetor says: "If the person sued swears in the form as tendered." "The person sued" we understand to be the defendant himself. The words

"in the form tendered" are not an empty addition; for if a defendant swears when nobody has tendered an oath to him, the praetor will not protect that oath, which is just a private matter of his own. If this were otherwise everyone of easy conscience would rush to untendered oath-taking as a means of shuffling off the troubles of litigation. 1. On the other hand, it does not matter what kind of action is brought against him whether *in personam* or *in rem* or *in factum* or for a penalty or other than for a penalty or in connection with an interdict; in all these, if he swears, his oath will work to his advantage. 2. The praetor will even protect oaths sworn about a person's status. So, for instance, if on my tender you swear you are not in my power, that oath will be protected. 3. Hence, Marcellus writes that it is even possible to take an oath—and one which will be given effect—on the question whether a woman is or is not pregnant. In the context of a question about custody, where, for example, she is willing to go into custody as being pregnant and someone contradicts her, he actually holds that the oath must be upheld either if she swears she is pregnant or if the contrary is sworn against her. For, if she swears, she will go into custody without fear, and if the oath is taken against her, she will not go at all even if genuinely pregnant. The advantage of the oath to the woman who swears is, says Marcellus, to prevent her being sued under the edict against going vexatiously into pregnancy-custody and to keep her from violence while in custody. Marcellus also considers the question whether the effect of the oath can go so far as, after the birth of the child, to make it impossible to ask whether it was begotten by the deceased or is not the person's it is said to be. He holds that the true facts must be discovered on the ground that an oath can neither benefit nor harm a stranger to it. The mother's oath cannot therefore benefit the child, who likewise cannot be prejudiced if, on the mother's tender, an oath is sworn that she is not pregnant by the deceased. 4. An oath ought to be sworn just as it is tendered. In the other case, as where I tender you an oath by a god and you swear on your own head,

4 PAUL, *Edict, book 18:* or on that of your sons,

5 ULPIAN, *Edict, book 22:* the oath is not to be held good. Yet if I tell you to swear by your salvation and you so swear, that will be valid. It is fitting to use any wholly lawful oath which a man may wish to have sworn to him; and an oath so made will be protected by the praetor. 1. A rescript of the deified Emperor Pius held that an oath sworn according to idiosyncratic superstition was valid. 2. Once an oath has been given, the only question is as to the swearing, the question whether anything is due is remitted, as sufficiently answered by the oath itself. 3. However, if one tenders an unlawful oath, as, for instance, by a publicly forbidden belief, is it to be thought of as if no oath has been sworn? I think that is the better view. 4. If an oath is neither sworn nor released, the matter ought to be considered as never reduced to oath-taking. Indeed, if the party is later prepared to swear, the oath will do him no good because not sworn according to the tender.

6 PAUL, *Edict, book 19:* An oath is released when the party making the tender is satisfied by the other's willingness to undertake the oath and lets him off when he is ready to swear. However, if he does not undertake to swear, then even if he is ready to swear later and the plaintiff will no longer tender, the oath will not be held to have been released. For release supposes a burden actually assumed.

7 ULPIAN, *Edict, book 22:* The praetor says: "In respect of a matter concerning which an oath has been tendered, I will not give an action either against the person to whom the tender is made or against a person whom that matter concerns." The words "in respect of a matter" must be understood according as the whole or only part of the affair is submitted to oath; for it is in respect of what is so submitted that he promises not to give an action whether against the oath-taker or against those who succeed to the place of the person to whom the oath was tendered,

8 PAUL, *Edict, book 18:* even if they succeed to the subject matter itself.

9 ULPIAN, *Edict, book 22:* For after an oath has been taken, actions are denied, or else if there is dispute, that is, if a question is raised whether any oath was given, there is room for a defense. 1. Once an oath has been given or released, the defendant acquires a defense for himself and others, but the plaintiff gets an action in which this sole question is asked: Did he swear, or being prepared to swear was he released from swearing that the debt was owed to him? 2. The better view is that condemnation after oath in a trial involving infamy itself leads to infamy. 3. If a person who is under an obligation to me in a time-limited action tenders me an oath that he owes the debt and I swear the oath, time will not release him, because after joinder of issue the obligation is perpetuated against him. 4. If a *minor* under twenty-five tenders an oath and says that he was overreached in that very matter, the defense of oath ought, as Pomponius holds, to be met by a replication. However, I do not think that that replication ought always to be given; frequently, the praetor himself should look into the question of overreaching and should arrange restitution accordingly. For the mere fact of minority certainly does not establish that the *minor* was misled. Furthermore, that defense or inquisition must not exceed the prescribed time after the twenty-fifth year. 5. If someone tenders an oath to a debtor in fraud of his creditors, the defense of oath must be met by a replication of fraud on creditors. Moreover, if the perpetrator of fraud tenders an oath to a creditor, who then swears a debt of ten is due, and soon afterward when his goods have been sold up himself wants to go to law, the action ought to be denied or met by the defense of creditors defrauded. 6. Julian writes that an oath tendered by an opponent to a defender or procurator accrues to and provides a defense for the principal. The same, therefore, must be said where I have appointed a procurator to sue. For if the defendant tenders him an oath that the debt is owed, that generates an action for me. This is the correct opinion. 7. If, after oath tendered by the possessor, a plaintiff swears a thing is his, an action will be granted to him but solely against the party who tendered the oath and those who later step into his shoes. However, if he seeks to use the earlier election for oath against a stranger, it will do him no good,

10 PAUL, *Edict, book 18:* since no harm must come to a stranger from what is done between parties.

11 ULPIAN, *Edict, book 22:* However, if the oath is tendered to the possessor, who swears the thing does not belong to the plaintiff, he can use the defense of oath, so long as he retains possession, against action by the plaintiff who tendered the oath. Once he loses possession, on the other hand, he will have no action, not even if the then possessor is the person who tendered him the oath. The reason is that he has not sworn the thing is his, only that it is not the other's. 1. Accordingly, if as possessor he did swear on the plaintiff's tender that the thing was his, the logical conclusion will be that out of possession he must be given an *actio in factum* if the oath-tenderer obtains possession. Once I have sworn a thing to be mine, fruits taken from it must also be restored to me. Further, it is agreed that after oath tendered, babies born and the offspring of animals are to be handed over. 2. Again, if I swear that the usufruct in a certain thing is mine or ought to be conveyed to me, all actions will lie for me just so far as they would if the usufruct were really mine; and they will cease to lie upon the events in which they would then be withdrawn. Even if someone swears he has or ought to have a usufruct in things in which because they are consumed by use there cannot be a usufruct, I think the force of the oath must be respected. Hence, I think that also in that case his oath is to be held to have been rightly taken and that on the basis of the oath he can, once the *cautio* has been offered, claim a usufruct. 3. Suppose there is a dispute between me and you about an inheritance, and I swear it

belongs to me. I ought to obtain what I would get if judgment in the matter of the inheritance went in my favor. And not only must you restore to me those things which you then possess but also the oath will operate in relation to things which subsequently come into your possession, exactly as would normal proof. An *actio utilis*, therefore, will lie for me. But if I am in possession under this same inheritance and when I have taken the oath against you, you lodge a claim against me for it, I ought to use the defense of oath. Obviously, if someone else initiates a claim for the inheritance from me, there is no doubt that the oath will do me no good. And that is what Julian writes too.

12 JULIAN, *Digest, book 9:* The same considerations apply if I want to claim things belonging to an inheritance which are in someone else's possession. For even if I had claimed the inheritance from you and had established it mine by normal proof, I would nevertheless be compelled to make the same proof again in an action brought against another.

13 ULPIAN, *Edict, book 22:* Suppose two patrons and a freedman who, on the tender of one, swears that he is not the freedman of that one. Does *bonorum possessio* lie for the other in respect of the whole or only of half the patron's due share? On this he holds that if the one to whom the oath was taken was a patron, the second can claim *bonorum possessio* only of his own share and cannot derive advantage from the fact that the freedman swore against the first. Yet before a judge great respect is to be paid to the honor and authority of patrons, whence he might have established that he was sole patron by the oath of the freedman that the other was not patron at all. 1. Julian holds that one who swears land is his after prescription through long passage of time must also have an *actio utilis*. 2. Julian also writes that one who has sworn that he has not committed theft is understood to have sworn away the whole matter; and the reason, he says, why he is not liable either to the action for theft or even to the *condictio* is that *condictio* only binds a thief. Surely, then one who swears that he has not committed theft may use a defense against a *condictio* brought against him on just that ground? However, if the plaintiff in the *condictio* maintains that he is bringing the action against the heir of the thief he ought not to be rebuffed; and the *condictio* ought to be granted to him against the thief's heir. The judge must then intervene to prevent any attempt to establish that the defendant is a thief. 3. Suppose someone swears that I sold him something for one hundred. He can bring the action on sale to enforce the rest of the obligations, that is to say, for delivery of the thing and for warranty against eviction. But can he be sued for the price? If the oath extended even to this, that the price was paid, no action for the price survives. If that was not sworn, the conclusion is that he is liable to pay it. 4. We shall hold the same of one who swears he entered a partnership; for he can be sued by the action on partnership. 5. Marcellus also writes that if one swears that land has been charged as a pledge for ten, he shall not be able to use the action on *pignus* until he has repaid ten and that it ought perhaps to be added that he can also be sued for ten on the basis of his own oath, which proves the matter quite well enough. Quintus Saturninus agreed with that. In support, he cites the case of the man who swore that his ex-wife had given him something by way of dowry. He says the wife was then entitled to an *actio utilis*. And I would not deny that that is not entirely unfair. 6. If in a money matter some one swears on the spirit of the emperor that a debt is not due from him or is due to him and proves forsworn or swears he will pay within a certain time and does not pay, it is held by rescript of our emperor and his father that he must be sent for flogging under a motto, "Take not oaths in vain."

14 PAUL, *Edict, book 3:* Wherever oaths are taken about a thing neither a parent nor a patron is released from swearing. There is swearing about a thing when, for instance,

an oath is demanded in relation to money lent when the plaintiff swears the debt is due or the defendant swears it is not. The same applies when an oath is demanded in relation to a *constitutum* of money.

15 PAUL, *Edict, book 6:* In the case of very important people and those disabled by their health, someone ought to be sent to them at home for the purpose of oath-taking.

16 ULPIAN, *Edict, book 10:* A patron who marries his own freedgirl is not compellable to take an oath in a trial of goods taken away. But if he himself tenders an oath to his freedwoman she ought not to take the oath about vexatious suits.

17 PAUL, *Edict, book 18:* An oath which is tendered outside legal proceedings by virtue of an agreement cannot be returned. 1. A *pupillus* must have his tutor's authority for tendering oaths. If his tender is made without the tutor's authority, he will encounter a defense but will be unable to use a replication, because he lacks the right to manage his own affairs. 2. An oath tendered by a tutor in the exercise of guardianship or by the curator of a lunatic or wastrel is to be considered good, since they are able to pass property in goods and receive payment, and when they sue, the matter is validly brought into issue. 3. Tenders by a procurator are also to be considered valid if he either manages the entire estate or is commissioned to that very task or is a procurator in his own interest.

18 ULPIAN, *Edict, book 26:* Julian writes in the tenth book of his *Digest* that in other circumstances oath-tender by a procurator is not to be admitted, lest the defendant, having once sworn, be exposed to action by the principal. Nor will it do him much good to take a *cautio* for ratification; for if the principal sues, he will still have to show that his oath was clean under the defense which he inserts; and if he takes action on this stipulation for ratification, he will himself be compelled to show himself not forsworn.

19 ULPIAN, *Edict, book 26:* If, under a mandate to sue, a procurator tenders an oath, he goes outside the scope of his mandate.

20 PAUL, *Edict, book 18:* Oath-tender and oath-taking by a slave is to be respected as valid so long as he has authority to manage his *peculium.*

21 GAIUS, *Provincial Edict, book 5:* For payments can validly be made to him, and he has the power to novate obligations.

22 PAUL, *Edict, book 18:* If a slave tenders an oath to a plaintiff, some say an action on *peculium* should also be granted against the master. The same of sons-in-power.

23 ULPIAN, *Edict, book 26:* If a slave swears that no debt is due from his master, the defense is to be conceded to the master and the other party can answer to himself for tendering an oath to a slave.

24 PAUL, *Edict, book 28:* All the more will a father be able to take advantage of the bond of his son with whom indeed litigation can be joined. But tenders by those in power cannot work to the detriment of their superiors.

25 ULPIAN, *Edict, book 26:* Furthermore, if my slave, on tender or countertender to him, swears that something belongs to or is due to his master, I think an action is to be granted to me or else a defense of pact by reason of the sacred bond and agreement.

26 PAUL, *Edict, book 18:* When someone is said to have taken an oath, it does not matter what age or sex he is; for everything must be done to safeguard oaths against those who were happy enough to make the tender. Yet a *pupillus* is never held to be forsworn, because not understood knowingly to deceive. 1. Where a father swore that a debt was not due from his son, Cassius gave the opinion that the defense of oath was to be given to both father and son. If the father swore there was nothing in the *peculium,* action could be brought against the son, but the father could also be sued

for account to be taken of *peculium* subsequently acquired. 2. The nature of an oath should be understood as setting it in the same category as delegation and novation; for it rests on agreement. Yet it does also have a resemblance to a judicial determination.

27 GAIUS, *Provincial Edict, book 5:* An oath even has the function of discharge.

28 PAUL, *Edict, book 18:* Where two people are bound by a stipulation, oath-tender by one will adversely affect the other. 1. An oath sworn by a principal accrues to the advantage of a verbal guarantor. And Cassius and Julian hold that one taken from the guarantor benefits the principal. For in that an oath can function as discharge, it is in that role that it must be seen in this case, so long as the reason for recourse to it is to do with the contract itself and the subject matter, not with the status of the oath-taker. 2. One promises to produce my debtor in court. Then, on my tender, he swears he never made any such promise for production of that person. That oath ought not to do my debtor any good. Suppose, though, that he swears he owes me no performance. A distinction must then be drawn and correctly carried through in a replication according as he swore because after making the promise he produced the debtor or because he paid the debt. The same distinction obtains in the case of a verbal guarantor of a debt. 3. Where there are two promisors of the same sum of money, the benefit of the oath must accrue to the other. 4. The defense of oath should meet not only the action on account of which the oath was demanded, if that be brought, but also any other, provided the same question is taken on to trial, as, for instance, if an oath is exacted because of a claim of mandate, unauthorized management, partnership, and so on and afterward a *condictio* for a fixed claim is brought on the same grounds; for these actions are consumed one by the other. 5. If someone swears that he has not commited robbery, he cannot be helped by that oath in an action for theft; for theft is different in that it can be committed by stealth. 6. Suppose a tenant farmer is sued by action on hire for cutting down trees. If he swears he did not cut them down, he can use the defense of oath against a claim under the *Twelve Tables* for trees cut down, under the *lex Aquilia* for wrongful loss or by the interdict against force and stealth. 7. If in divorce a woman swears she has not removed any property, she is not to be given the benefit of the defense if sued *in rem*, and if she maintains the thing in question is hers, there is need of another oath. Contrariwise, if she swears the thing is hers, she ought to be given the defense in an action for property removed. This is so thoroughly to be observed that even if it is by another action that the same question is raised, the defense of oath still applies. 8. Suppose therefore that one swears that he has not suffered judicial condemnation. If, in respect of the matter adjudged, he is sued by the action upon stipulation to satisfy judgment, he will nevertheless have the defense. On the other hand, if when sued upon the stipulation to satisfy judgment he swears he is not obliged to pay, the defense will actually not impede an action for a judgment-debt, because it can happen that the stipulation still remains dormant even although judgment has been entered. It would be different if the terms of his oath were that he had not been condemned. 9. Again, Pomponius holds that one who swears something has been stolen from him does not thereby immediately acquire the *condictio*. 10. Further, although under this part [of the edict] an oath generates both claims and defenses, yet if it happens that upon a plaintiff's tender out of court, a defendant swears no debt is due and then, on the defendant's tender, the plaintiff swears the debt is due or vice versa, the later oath-taking will be held the stronger. Moreover, no prejudice will be worked by the forsworn oath of the other because the question will not be whether he ought to pay but whether the plaintiff did swear.

29 TRYPHONINUS, *Disputations, book 6:* But if, on your tender, I take an oath that you did not swear that a debt was due to you, the *actio utilis* which asks the question whether you swore the debt due to you is to be met with the defense of oath, which

here extinguishes the very question put by the action.

30 PAUL, *Edict, book 18:* Pedius holds that if one swears that something is owed to him under an action which doubles on denial, it is the single claim not the double, which he acquires. It is quite enough that the plaintiff is relieved of the necessity of making his proof, given that the claim for double survives intact if this part of the edict is passed over. Also, it can be said that the business if this action is not the principal subject matter but the protection of the plaintiff's oath. 1. If I swear that you are under a duty to give me Stichus and he is no longer alive, the defendant is not liable to pay even his value, except where the claim is grounded on theft or on account of delay in which cases the value of the slave must be paid even after his death. 2. If a woman swears she is owed a dowry of ten, the whole of that sum must be paid to her. But if she swears she gave ten as a dowry, the one issue not in question is whether she gave them; for, it being assumed that she did give them, there has to be found for her the sum which she ought to be given back. 3. In actions maintainable by members of the public, an oath taken by one will only serve against others if exacted in good faith. For if someone initiates a public action, it is only if there is no collusion that the right of further action is extinguished. 4. If, on a patron's tender, a freedman swears that he is not a freedman, the oath is to be held good with the effect that claims should not be allowed either to day works or to *bonorum possessio* against the will. 5. If I swear a usufruct is due to me, it should only be conveyed if I give the *cautio* for use by the standard of a reasonable man and for restitution at the end of the term.

31 GAIUS, *Provincial Edict, book 30:* We must observe that on occasion, even after an oath has been exacted, imperial *constitutiones* allow a cause of action to be resuscitated, where someone says he has found new documents on which alone he is going to rely. However, these *constitutiones* are confined to the case in which someone has been absolved by a judge (for it is a frequent practice of judges in doubtful cases to pronounce, after an oath has been exacted, in favor of the party swearing). If in other circumstances the parties themselves settle their affair by an oath, then the same course is not allowed to be revived.

32 MODESTINUS, *Distinctions, book [1]:* A *pupillus* cannot let someone off an oath.

33 ULPIAN, *Sabinus, book 28:* Even though an oath on one's own salvation seems to be an oath by god (for such an oath is taken in reliance on the divine presence), it is nevertheless void unless expressly tendered in those terms. Hence, it is necessary to swear again from the beginning in proper form.

34 ULPIAN, *Edict, book 26:* Oaths can operate in relation to money matters and all goods, and tender can even be made in respect of services, and the other party cannot say that that is unfair because it is open to him to make a countertender. What happens, though, if the reason why a party says he is discharged is that he thinks Stichus, whom he promised, has died? He will not find safety in countertender. That is why Marcellus thinks and rightly that in such a case he ought either to be excused the oath or be given time to ascertain the facts and so to swear. 1. The defender of a municipality or of any other body has power to tender oaths if his mandate runs to that. 2. Oaths are not tendered to a *pupillus*. 3. A procurator is not compellable to swear. No more a defender. Thus, Julian writes in the tenth book of his *Digest* that in the case of a defender being not compellable to swear, it suffices for a full defense if he is prepared to accept joinder of issue. 4. One who tenders an oath ought first to swear against vexatiousness, if he is asked to. After that the oath he proposes will be sworn for him. Patrons and parents are no less excused this oath against vexatiousness. 5. If the parties have doubts about the form of the oath, its drafting falls to the supervision of the judge. 6. The praetor says: "In the case of one from whom an oath is

sought, I will compel him either to swear or to perform." Hence, the defendant must choose between oath and performance. If he does not swear, the praetor will compel him to perform. 7. In fact, he has another option too; for he can, if he prefers, make countertender of the oath. If then the one who made the demand does not adopt the terms of his oath himself, the praetor will not allow his issue to go to trial. This is very fairly done; for one ought not to cavil at the form of an oath tendered by oneself. Moreover, the oath against vexatiousness cannot be put to one who makes a countertender; for it is not tolerable for a plaintiff to expect oaths concerning the vexatiousness of terms tendered by himself. 8. It is not always sensible for the countertender to be made in every respect in the same terms as the tender, as where, for instance, complications arise from difference of subject matter or parties which necessitate modification. If this kind of thing happens, therefore, it belongs to the discretion of the judge to settle the framing of this type of oath. 9. This is what happens when an issue is put to oath: If the defendant swears, the judge absolves him; if he countertenders, the judge will hear him and, if the plaintiff swears, will condemn the defendant; if the defendant will not swear, if he performs, the judge absolves him, if he does not perform, the judge condemns him; if after countertender the plaintiff does not swear, the judge absolves the defendant.

35 PAUL, *Edict, book 28:* If the tutor of a *pupillus* tenders an oath when all other modes of proof fail him, he must be heard to the extent that an action will be denied to the *pupillus*. 1. A wastrel who tenders an oath is not to be heard, and the same applies to him in other similar cases. For whether this oath is equiparated to an agreed pact, to performance, or to trial, it is not to be put to the test on the tender of anyone who has not the necessary capacity. 2. Persons not compellable to accept trial at Rome, as, for instance, provincial legates, can also not be compelled to swear.

36 ULPIAN, *Edict, book 27:* Suppose a plaintiff tenders an oath solely about a *constitutum* of money, and the defendant swears. The defendant has a defense against suit brought on the *constitutum*. On the other hand, if he is sued for the principal, that is, upon the pre-existing obligation, he will have no defense, unless oath and tender were about that too.

37 ULPIAN, *Edict, book 33:* Where an oath is not excused, but the person tendering offers no oath against vexatiousness, the consequence is that action must be denied him. For one who proceeds to oath-tender without first taking the oath against vexatiousness has only himself to blame if he finds himself treated as one who has let the other off.

38 PAUL, *Edict, book 37:* It is an indication of manifest wickedness and an admission to refuse to swear or to countertender.

39 JULIAN, *Digest, book 10:* Suppose someone makes a pact with his debtor not to claim money from him if he swears he has not climbed the Capitol or has or has not done something or other, and the debtor swears. The defense of oath must be given, and in case of payment, there must be recovery. For it is quite lawful to have an agreement, some aspect of which is rested upon oath.

40 JULIAN, *Digest, book 13:* An oath exacted from a debtor has the effect of freeing a pledge, for it is to be likened to a formal discharge. It certainly generates a perpetual defense. Thus, a creditor suing for a penalty must also be defeated, and anything paid can be recovered. Indeed, recourse to oath concludes conflict on every aspect of a matter.

41 POMPONIUS, *Rules, sole book:* Labeo gave the opinion that someone could be let off an oath even in his absence and without his knowledge. It can also be done by letter.

42 POMPONIUS, *Letters, book 18:* A creditor was pursuing a claim for money lent against a *pupillus*. On his tender, the *pupillus* swore no debt was due. Now the creditor comes against his guarantor for the same money. Is he to be silenced by the defense of oath? Write and tell me what you think. Julian's explanation of this matter is

clear enough. For if the creditor and the *pupillus* were arguing about the fundamental question whether any loan of money had been received and the agreement was that if the pupil took the oath every aspect of the dispute should be given up, then, the oath being sworn, the natural obligation is extinguished, and any payment is recoverable. On the other hand, if the creditor's contention was that he made the loan and the pupil's only answer was that his tutor had not been brought in, recourse to an oath of that kind will not lead to the praetor's protecting the guarantor. However, if it cannot be clearly shown what was intended and it remains doubtful, as often happens, whether the dispute between creditor and *pupillus* was as to fact or law, we must assume that it was intended between them that if he swore no debt was due then every aspect of the dispute would be given up. 1. If a verbal guarantor swears he owes nothing, the principal promisor gets a defense of oath to make him safe. However, if he swears as one who never gave any guarantee at all, that oath ought not to accrue to the advantage of the principal promisor. 2. If, on a plaintiff's tender, the defender of the other party, himself absent or present, swears his principal owes nothing, then the defense of oath ought to be given to the latter on whose account the swearing was to be done. The same applies where the defender of a guarantor takes an oath with the effect, that is, of giving a defense to the principal debtor. 3. Again, if the principal debtor swears, the guarantor will be safe, since it is also the case that each can take the advantage of the other's defense of *res judicata.*

3

OATHS AS TO THE VALUE IN ISSUE

1 ULPIAN, *Sabinus, book 51:* We do not hold that a matter which is taken to trial goes up in value by reason merely of the fact that through an oath as to value the amount of the condemnation may increase because of the contumacy of a defendant who will not make restoration. It is not that the value of the thing goes up, but rather that as a result of the contumacy, the award runs beyond its price.

2 PAUL, *Sabinus, book 13:* Whether our action claims something as our own or is for the production of something, sometimes there is simply valuation of the plaintiff's interest. This is so where mere fault of the person not making restoration or production is being penalized. However, when it is a case of malice or contumacy on the part of the person who will not restore or produce, then what holds is the plaintiff's oath as to value.

3 ULPIAN, *Edict, book 30:* In relation to coins which have been deposited, a judge ought not to tender an oath as to value and thus allow someone to swear the value of his interest, because the value of coins is fixed. An exception is where, for instance, the oath is as to his interest in getting the coins back on the day he appointed. Otherwise, what about the case where he owed money under penalty? Or against a pledge which was sold because the money deposited was denied to him?

4 ULPIAN, *Edict, book 36:* Who can swear in guardianship cases and against whom? The *pupillus* himself certainly cannot, if he is *impubes.* So held in many rescripts. Indeed, the deified brothers issued rescripts holding that a tutor could not be compelled to swear and a mother could not be allowed to do so, not even if willing. For the

temptation to perjury for profit at another's expense and without the knowledge or consent of the tutors was thought to be a serious matter. It is also held in rescripts of our emperor and his deified father that curators of *pupilli* and of *minores* cannot be made to take the oath as to value. If, however, tutors and curators are willing to show such favor to their *pupilli* or *minores*, the authority of the law will not oppose their using that means of bringing to an end suits which are joined between themselves. For the valuation in the oath must have regard not to their own interest but to that of the principal for whom the guardianship account is sought. But the minor may swear if he wishes. 1. The oath must be tendered by the judge; if not and the oath is sworn on someone else's tender or on no tender at all, conscience is not bound, and the oath is void. This has been laid down in the *constitutiones* of our emperor and his deified father. 2. There is no limit on the content of oaths. But can a judge set a measure to an oath so as to restrict it to a fixed maximum and to prevent someone seizing the opportunity to swear for an enormous sum? It is certainly not to be doubted that the judge has a discretion whether to tender the oath. The question, therefore, becomes whether someone who can withhold tender in the first place can also allow it subject to an upper limit. That is indeed quite in accord with the discretion of the judge, based as it is on good faith. 3. Again, can a judge, once having tendered the oath, refuse to follow it and, instead, absolutely absolve or enter a condemnation for a sum smaller than that sworn? The better view is that he can if he has a strong reason and where new evidence appears after the oath. 4. The oath ought not to be tendered in the case of mere fault, but the judge himself should rather make the valuation.

5 MARCIAN, *Rules, book 4:* Oaths as to value in issue are taken in actions *in rem* and for production and also in trials based on good faith. 1. But the judge has power to set in advance the maximum sum within which the oath must be kept; for he is also entitled not to tender the oath in the first place. 2. Also, even if the oath is taken, the judge may either absolve or condemn for less. 3. In all these actions, however, the oath as to value is taken only on account of malice, not of mere fault, which falls to the judge to value. 4. Obviously, there are occasions for an oath as to value even in an action with a trial based on strict law. An example is where one who has promised to give Stichus falls into delay and then Stichus dies; for a judge cannot value a nonexistent thing without recourse to oaths.

6 PAUL, *Edict, book 26:* In other circumstances, it is not the practice to take the oath in actions on stipulation and under a will.

7 ULPIAN, *Edict, book 8:* It is generally assumed that nobody may take the oath as to value except the principal litigant. Papinian actually holds that no one can swear other than the person in whose name issue is joined.

8 MARCELLUS, *Digest, book 8:* A tutor in possession of an adult's property will not restore it. Should he be condemned for its value or for the value put on it in the oath? My answer is that it is not fair to limit the award to the price, that is to say, to the value of the thing, since contumacy must also be punished and, given that the plaintiff does have the privilege of the oath as to value, the price is anyway to be left to the power of the owner to decide.

9 JAVOLENUS, *From Cassius, book 15:* In the action of theft, it is proper to swear that the thing had such and such a value when the theft was committed. The phrase "or a greater value" ought not to be added, because something which has a value greater than x does nevertheless have the value x.

10 CALLISTRATUS, *Questions, book 1:* In the case of documents which a party fails to produce, the plaintiff is allowed to take the oath as to value to quantify his interest in their discovery. The defendant is then condemned for the amount sworn. That was also decided in a rescript of the deified Commodus.

11 PAUL, *Replies, book 3:* It is not readily allowed to inquire into the perjury of one who swears an oath under compulsion of law.

4

THE *CONDICTIO* FOR NONRECIPROCATION

1 ULPIAN, *Edict, book 26:* When money is given for a purpose which is not improper, as for the emancipation of a son, the manumission of a slave or the abandonment of a suit, recovery ceases once the desired state of affairs has come about. 1. If I give you ten in satisfaction of a condition and soon afterward I repudiate the inheritance or legacy, I can bring the *condictio.*

2 HERMOGENIAN, *Epitome of Law, book 2:* The ten can also be recovered as for failure of the anticipated state of affairs if the will is pronounced false other than by reason of wrongdoing by the payer or is pronounced undutiful.

3 ULPIAN, *Edict, book 26:* I give you money to stop us going to law. As I have in a manner of speaking settled, can I bring a *condictio* if no *cautio* not to sue is executed for me? The truth is it all depends whether I paid up against suit being started or against a promise not to sue. If against a promise not to sue, the *condictio* lies if no promise is given. If against starting suit, the *condictio* does not lie so long as no suit is begun. 1. The same applies if I pay you not to manumit Stichus. There too the *condictio* is to be given or withheld according to the distinction taken in the preceding passage. 2. But if I pay you to manumit Stichus, I can bring a *condictio* if you do not do it. The same if I change my mind. 3. What if I pay you to manumit him within a fixed time? While the period runs recovery is to be refused, unless I change my mind. When the period has passed, the *condictio* lies. Suppose that Stichus dies. Can the payment then be recovered? Proculus holds that if he dies after the time fixed for manumission, recovery is to be allowed; if not, not. 4. Suppose, though, that I give you nothing for the manumission, but it is agreed that I shall give you something. When Stichus dies, action on that contract still survives for you—the *condictio,* that is to say. 5. If a freeman serving me in good faith gives me money to manumit him and I do it, can he later bring a *condictio* against me after he has established his status? Julian, in the eleventh book of his *Digest,* writes that he can recover after manumission. Neratius tells in his book, *Parchments,* how Paris the dancer recovered before a judge from Domitia, daughter of Nero, the ten he had paid her for his freedom, and he says it was never asked whether Domitia knew he was free when she received them. 6. Celsus writes that one who (in the absence of such a direction) pays me ten as a *statuliber* can recover by *condictio.* 7. Suppose a slave who by a will is made free on condition of paying the heir ten and by codicil is made free unconditionally. In ignorance of the codicil, he pays ten to the heir. Can he recover? Celsus reports his father as holding that he cannot, but Celsus himself, influenced by considerations of natural equity, thinks that he can. And that is the better opinion, even though it is agreed, as he himself says, that one who pays in the hope and belief that the recipient will reward him or be better disposed to him in time to come cannot recover when he turns out later to have been let down by a wrong direction. 8. He also goes nicely into the question whether one who thinks he is a *statuliber* fails to pass title to coins which he pays the heir, given that he thinks they belong to the heir when they are really his own, acquired after his freedom became effective under the will. I think that if he pays with that intention, no property passes. What if he pays someone other than the heir, believing himself directed to do so? If the coins come from the *peculium,* no title passes to the recipient. However, if someone else pays on his behalf or he himself pays after becoming free, title will pass to the recipient. 9. Even although a *statuliber* is allowed to satisfy his condition from his *peculium,* yet if the heir wants to keep the money safe, he can forbid any payment to be made. If this happens, the *statuliber*

who is prevented from conforming to the testator's wishes becomes free by constructive satisfaction of the condition; and the coins are preserved as well. However, one whom the testator wished to be paid can maintain an *actio in factum* against the heir to get the testator's intention respected.

4 ULPIAN, *Edict, book 39:* Suppose a creditor formally releases his debtor on the latter's agreement to provide a new promisor. If he does not do it, the party formally released can be said to be subject to a *condictio.*

5 ULPIAN, *Disputations, book 2:* Suppose you are given money to go to Capua and then, when you are ready, the state of the weather or of your health prevents your setting off. Can a *condictio* lie against you? When this happens without fault on your part, it can be said there will be no recovery; but since the payer is allowed to change his mind, there is no doubt that what he paid can be recovered, unless perhaps you have an interest in not having received money on this ground. So the *condictio* will not lie if circumstances are such that you have arranged your affairs in such a way that though you have not yet set out, you do now have to go or that your expenses necessary for the journey clearly exceed the amount which you received. On the other hand, if you have laid out less than you received, the *condictio* will lie, but only if you are reimbursed your expenses. 1. Suppose someone delivers a slave to another to be manumitted within a certain time and then, though the deliverer changes his mind and tells the deliveree, the slave is manumitted after the countermand. An action lies to the deliverer on account of the countermand. Clearly, if the slave is not manumitted, the *constitutio* will operate to make him free if there is no countermand within the period. 2. Again, suppose someone gives Titius ten to buy a slave and manumit him, and then he changes his mind. If the slave has not yet been bought the change of mind will give rise to a *condictio* so long as clear notice has been given to him to prevent his suffering loss by a subsequent purchase. If the slave has already been bought, the change of mind will not harm the buyer. He will just give back the slave he has bought instead of the ten he was given. In the case where the slave has already died, the buyer need do no more, so long as it was not his fault. Similarly, no performance will be due from him if, without fault in him, the slave becomes a fugitive, though plainly he ought to promise that if he should come back into his power, he will be returned. 3. But if one is given money just to manumit a slave and he becomes a fugitive before manumission, can the money given be recovered by *condictio*? Certainly not, if the slave was going to be sold and was withdrawn because money was received for him to be manumitted. Clearly, the recipient will undertake that in the event of the slave's coming back into his power, he will restore what he received, less the depreciation of the slave due to his flight. Clearly, too, if the payer still wants him manumitted, and the owner, being angered by the escape, will not, then the whole sum received must be restored. However, if the payer of the ten opts to have the slave, either the slave must be given up or the sum received must be restored. On the other hand, if the slave was not going to be sold, what was received must be given back unless, for instance, he would have kept the slave more closely if he had not been given money for his manumission. In that case, it is not fair to strip him of both slave and price. 4. Where one is given money for a manumission and then the slave dies, if there is delay in making the manumission, the result is that we hold there has to be restitution of what was received. On the other hand, if the recipient is not in delay and the slave dies on the way after beginning the journey to the governor or some other person before whom the manumission could be done, the better view is that whether he was going to sell him or use him himself, he ought not to be held bound to make restitution. To be sure, if he was not going about doing any of these things, he must bear the loss from the slave's death inasmuch as he would have died anyhow even if nothing had been received for his manumission. The exception is where the setting off to do the manumission provided the occasion of his death, as where he was killed by robbers, crushed in

the collapse of a stable, run over by a vehicle, or met his end in some other way which he would not if he had not set off on account of the manumission.

6 ULPIAN, *Disputations, book 3:* Someone outside the family gives a dowry for a woman, and it is agreed that however the marriage ends, the dowry shall return to him. The marriage never takes place. Because only events subsequent to the marriage are contemplated by the agreement, there is a question whether the *condictio* lies to the woman or the donor of the dowry. It is likely that the donor intends to safeguard his own interest in this case. For one who gives on account of a marriage can, if no marriage happens, use the *condictio* as for nonmaterialization of an expected state of affairs, unless, as may happen, the woman produces the clearest proof that he acted with a view to providing for her, not his own, interest. Similarly, if a father gives on account of his daughter and makes the same agreement, Marcellus holds that unless it is clearly intended otherwise, the father has the *condictio.*

7 JULIAN, *Digest, book 16:* One who believes he owes money to a woman promises it to her fiancé on her authority as a dowry. He pays. Then no marriage happens. Can he recover the money paid, or can the woman? Nerva and Atilicinus held this opinion: Because he thought he owed, but could have met a claim with a defense of fraud, he himself will recover; but, had he promised knowing he owed nothing to the woman, she would have the action because the money would be hers; yet, if he had really been her debtor and had paid in anticipation of a marriage which never came off, he would have the *condictio* himself. Then the debt would survive for the woman solely for the purpose of enabling her to compel her debtor to assign his *condictio* to her. 1. Land delivered as dowry can be recovered by *condictio* if no marriage follows. And the *condictio* lies for fruits too. The same law applies to a slave-girl and her offspring.

8 NERATIUS, *Parchments, book 2:* When in his book on dowries Servius writes of the recoverability of a dowry given for a marriage between parties one of whom is below the lawful age, he is to be understood as meaning that the money can be recovered if divorce intervenes before both reach the lawful age. So long, however, as their quasi-matrimonial relationship endures the dowry can no more be recovered than can one which passes between fiancée and fiancé can be reclaimed while that relationship subsists. Property given in this way before a marriage is entered as given, so to speak, as a potential dowry. So long as the potential remains, there is no recovery.

9 PAUL, *Plautius, book 17:* I am minded to make a gift to a woman. At her request I pay her fiancé. If no marriage follows, the woman will have the *condictio.* But suppose I make a contract with the fiancé and give him money on the understanding that if the marriage follows the woman shall have it as her dowry. If no marriage happens, it must be given back to me, and I shall have my *condictio* against the fiancé as for something given for a purpose never materializing. 1. Suppose that, on the authority of a woman, someone promises her fiancé money mistakenly supposed to be owed, and the marriage does follow. He cannot use the defense of fraud; for the husband is only looking to his own interest and is not perpetrating any fraud. Nor ought he to be let down, which he would be if forced to take an undowered wife. So the *condictio* must go against the woman either to get back from her the payment to the husband or, if nothing has yet been paid, to effect a discharge. However, even if the husband sues after the marriage has been dissolved, he ought to encounter a defense only in respect of the proportion which the woman would take from him.

10 JAVOLENUS, *From Plautius, book 1:* Suppose that a woman, wanting to give a dowry to her future husband, formally releases a debt of money due from him to her. If no marriage follows, she can rightly maintain her *condictio.* It is of no importance whether the money has reached him by a payment without a valid ground or by a formal release.

11 JULIAN, *Digest, book 10:* An heir is directed to make a monument for a certain sum

in a form to be settled by a freedman. He gives the freedman the money, and he, having taken the money, makes no monument. He is liable under the *condictio.*

12 PAUL, *Lex Julia et Papia, book 6:* When, after recovery of the donor, a *condictio* is brought to reclaim a gift made in contemplation of death, the plaintiff can also get the fruits of the subject matter of the gift; so also offspring and accretions to the subject matter.

13 MARCIAN, *Rules, book 3:* If a son brings in a share for his brother on the ground that he is about to obtain *bonorum possessio* and then never does get it, Marcellus writes in the fifth book of his *Digest* that he can claim the share back.

14 PAUL, *Sabinus, book 3:* If money supposed to be due is paid to a false procurator, it can only not be recovered from the procurator if the principal ratifies, in which case the principal is liable, as Julian writes. In the absence of ratification by the principal, even money actually owed can be recovered from the procurator himself. The reason is that the basis of recovery is not as for money not owed, but rather as money given for a purpose never materializing, which is what happens when ratification is withheld; alternatively, as for theft by the false procurator, against whom not only the action for theft but also the *condictio* goes.

15 POMPONIUS, *Sabinus, book 22:* Attius suspected your slave of theft. You gave him up for questioning on the basis that if nothing was found against him, he would be given back to you. Attius handed him over to the prefect of the watch as one caught red-handed. The prefect of the watch exacted the ultimate punishment. You will sue Attius maintaining that he ought at civil law to give the slave to you; for his obligation to do so antedated the death. Labeo says you can also bring the action for his production, since the impossibility of production has been brought about by his conduct. However, Proculus says there can only be an obligation to give if you initially transferred the property in the slave to Attius in which case you cannot have the action for production. Yet, if the property in the slave remained in you, you could sue Attius for theft too; for he has used property belonging to another knowing he was doing so without the owner's consent or that the owner, if he knew, would forbid it.

16 CELSUS, *Digest, book 3:* I gave you money for you to give me Stichus. Is that kind of contract partly sale and purchase, or is there no obligation other than that which arises when something is given for a purpose which fails to materialize? I incline to the latter opinion. Hence, if Stichus is dead, I can recover what I paid you to give him to me. Suppose Stichus belongs to someone else, but you have nevertheless delivered him. I can recover the money from you, because you have not transferred title to the recipient. Again, if Stichus is yours and you will not give the guarantee against eviction, you will not escape my claim to recover the money from you.

5

THE *CONDICTIO* FOR IMMORAL OR ILLEGAL PAYMENTS

1 PAUL, *Sabinus, book 10:* Everything given is given either because a purpose is envisaged or a basis assumed, and of purposes some are evil and some worthy. Then, in the case of evil purposes, the giver may be in the wrong and not the recipient, or the recipient and not the giver, or both may be. 1. What is given for a worthy purpose cannot be reclaimed unless the purpose envisaged fails to materialize. 2. However, in the case of an evil purpose, where the recipient is in the wrong, there can be recovery even if the purpose envisaged does materialize.

2 ULPIAN, *Edict, book 26:* By way of example, take the case in which I pay you not

to commit sacrilege, not to steal, or not to kill a man. In Julian's writings, it is held that in this kind of case, where I give to stop you killing someone, a *condictio* does lie. Similarly, in the case where I pay to make you give me back something deposited with you, a document, for instance. 2. Indeed, it has been held that a *condictio* lies where, when I have a winning cause of action, I pay to make the judge pronounce in my favor. However, then the payer commits an offense (for he corrupts the judge), and not so long ago our emperor held that he loses his case.

3 PAUL, *Sabinus, book 10:* When the evil taints both giver and recipient, we hold recovery to be excluded, as where money is given to pervert a judgment.

4 ULPIAN, *Edict, book 26:* The same applies where something is given for sexual malpractice or where one caught in adultery buys his way out. There is no recovery there. So held in replies of Sabinus and Pegasus. 1. Again, if a thief pays to avoid being given away, there is no recovery, for both parties are tainted. 2. Celsus says that wherever the taint of evil touches only the recipient recovery is possible, as, for instance, where I pay to prevent your committing *iniuria* against me. 3. What is given to a prostitute cannot be recovered. Labeo and Marcellus so write, but they have an original reason: not that both parties are tainted but that the payer alone is; for the prostitute does wrong to be one but, being one, does no wrong in taking money. 4. If I give you money to reveal the whereabouts of my runaway slave or of the thief of my property, the payment cannot be recovered; for then it is not wrong of you to have taken it. But if you take something from my runaway to stop you giving him away, I can sue you by *condictio* as though you were a thief, and I think the *condictio* also lies if the thief himself or the accomplice of a thief or runaway is given this reward money.

5 JULIAN, *Urseius Ferox, book 3:* If someone is given money by my slave to stop him revealing a theft committed by the slave, a reply of Proculus holds that the money will be recoverable whether or not he reveals the theft.

6 ULPIAN, *Sabinus, book 18:* Sabinus always said the early jurists were right in holding that the *condictio* would go for anything in someone's hands on an unlawful basis. Celsus shares that view.

7 POMPONIUS, *Sabinus, book 22:* It is agreed that money exacted under a stipulation itself extorted by force is recoverable.

8 PAUL, *Questions, book 3:* If the basis of your promise to Titius is evil you can defeat his action by the defense of fraud or one adjusted to the circumstances. Yet, despite that, if you pay, you cannot recover. The reason is that though the immediate basis, the stipulation, is out of the way, being rendered empty by the availability of the defense, the antecedent basis still operates, namely the evil itself. Furthermore, if both parties, giver and recipient, are tainted, the possessor is stronger, and no recovery is therefore possible even though the payment is made under a stipulation.

9 PAUL, *Plautius, book 5:* If I lend you clothes for use and then pay you a price to get them back, the reply has been given that I will be right to sue by *condictio*. Though the giving was for a purpose and the purpose has materialized, it was nevertheless wrongful. 1. If you are given money to release things hired to you, sold by you, or entrusted to you under a mandate, I shall have against you the actions of hire, sale, or mandate, but if I give you money to get from you something owed by you under a will or stipulation, only the *condictio* will lie to recover that payment. So Pomponius also writes.

6

THE *CONDICTIO* FOR MONEY[1] NOT OWED

1 ULPIAN, *Edict, book 26:* Now we must turn to the payment of money not owed. If someone mistakenly pays what is not due he can recover by this *condictio.* However, if he knows the money is not owed, the payment is not recoverable.

2 ULPIAN, *Sabinus, book 16:* If a man makes a payment on the condition that if it turns out not to be owed or to be caught by the *lex Falcidia* it must be given back, an action will lie for its recovery. 1. Anything paid out under a will which turns out to be forged, undutiful, void, or avoided is recoverable. The same is true where after lapse of time new debts appear or long concealed codicils are produced which adeem legacies or reduce them by adding to the number of legatees. A rescript of the deified Emperor Hadrian holds that in the case of forged and undutiful wills, the action must go to the person who obtains judgment in respect of the inheritance.

3 PAPINIAN, *Questions, book 28:* The same applies where, after the legacies have been paid, some new and unexpected reason carries off the estate, as for instance, the birth of a posthumous child not known by the heir to have been *en ventre* or the return from enemy hands of a son assumed by the father to have died. For a rescript of the Emperor Titus Antoninus holds that an *actio utilis* ought to be given to the infant or son who displaces the other from the inheritance. No doubt the reason is that possessors in good faith are answerable to the extent that they have been enriched and that the risk of this kind of claim will not attach to one who is not guilty of fault in paying out.

4 PAUL, *Sabinus, book 3:* A rescript of the deified Emperor Hadrian applied the same rule to the case in which another will was produced.

5 ULPIAN, *Sabinus, book 16:* There is nothing new about one person recovering what another has paid. For there was a rescript to Arrius Titianus which held that where a *minor* under twenty-five who had inadvisedly entered an inheritance was restored to his original position after legacies had been paid, the claim for recovery was maintainable not by him, but by the person now interested in the goods.

6 PAUL, *Sabinus, book 3:* It is held in the *Posthumous Works* of Labeo that where your procurator pays money which is not owed and you withhold ratification, recovery is possible, while Celsus holds that where there is an actual debt, no recovery lies. The reason is that when a man appoints someone to be procurator of his affairs, he impliedly authorizes him to pay off a creditor, and there ought not to be any waiting around afterward for ratification. 1. Labeo also says that if what is not owed is paid to a procurator and the principal does not ratify, it can be recovered. 2. Celsus says the debt of one who pays a procurator is discharged at once and he need not worry about ratification, but that where what is not owed is paid to a procurator there does need to be a ratification, because the implied authority does not extend to exacting payments of that kind with the effect that in the absence of ratification, recovery must be from the procurator. 3. Julian says that neither tutors nor procurators who make payments can recover and that it is immaterial whether the money they use is their own or their ward's or principal's.

7 POMPONIUS, *Sabinus, book 9:* When debts not due are discharged in error, recovery is either of what is actually given or its value in money.

8 PAUL, *Sabinus, book 6:* When a husband is insolvent, what someone pays to the wife on his account is not recoverable; for there is sufficiently a debt to the woman.

9 ULPIAN, *Edict, book 66:* Indeed, a husband too, if he has no room for maneuver and pays over the dowry, is in that same position of being barred from recovery.

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1. "Money" does not appear in the Latin and is in fact not always the object of this claim.

10 PAUL, *Sabinus, book 7:* A debtor whose debt falls due on a given day is still sufficiently a debtor not to be able to recover a payment made before that day.

11 ULPIAN, *Sabinus, book 35:* If the defendant to an action on *peculium* inadvertently pays more than the *peculium* is worth, he cannot recover.

12 PAUL, *Sabinus, book 7:* I grant a usufruct of my land to you mistakenly thinking I am bound to do so. Then, before I claim it back, I die. My *condictio* also goes to my heir.

13 PAUL, *Sabinus, book 10:* A slave can incur a natural obligation. Consequently, if someone pays on his account or if, as Pomponius writes, after manumission he himself pays from a *peculium* which he had license to administer, there is no recovery. It follows that a verbal guarantor accepted for a slave is liable and a *pignus* given for him is charged; further, that if a slave with license to administer his *peculium* gives a pledge as security for his debt, an *actio utilis* based on the action for *pignus* must be given. 1. Similarly, where a *pupillus* receives a loan without his tutor's authority and is thereby enriched, what he pays after reaching puberty cannot be recovered.

14 POMPONIUS, *Sabinus, book 21:* For it is by nature fair that nobody should enrich himself at the expense of another.

15 PAUL, *Sabinus, book 10:* The *condictio* is based on natural reason, and consequently it extends to include accessions to the subject matter made over, as for instance, offspring born to a slave-girl or alluvial accretions to land; further, fruits taken in good faith by the recipient are also covered by the *condictio.* 1. If coins belonging to another are given, the *condictio* lies, just to recover possession. Similarly, I can bring the *condictio* if I hand something over in the mistaken belief that I am bound to give you possession of it. Even when I deliver possession in circumstances in which prescription by long passage of time will prevent claims against you, I can still rightly maintain against you the *condictio* for what is not owed. 2. Also, if there is a usufruct belonging to another in the subject matter made over, my *condictio* can be maintained against you subject to exclusion of the usufruct.

16 POMPONIUS, *Sabinus, book 15:* In conditional debts, a mistaken payment before fulfillment of the condition can be recovered but not once the condition has been satisfied. 1. Where a debt falls due on an unfixed day, recovery is impossible since the day must come.

17 ULPIAN, *Edict, book 2:* Celsus holds that if I promise that I will give you something when I lie dying and then I hand it over before that, there can be no recovery. And that view is right.

18 ULPIAN, *Sabinus, book 47:* When something is owed subject to a condition which is bound at all events to be fulfilled, there can be no recovery if it is paid over, even though a payment beforehand is recoverable in the case of other conditons whose issue is doubtful.

19 POMPONIUS, *Sabinus, book 22:* If a debtor is released by way of imposing a penalty upon the creditor, there still remains a natural obligation, so that any payment is irrecoverable. 1. Suppose someone receives what is due to him, but in fact it is not due from the person who pays; recovery is allowed. An example is provided by the case in

which one who wrongly thinks himself heir or entitled to *bonorum possessio* pays a creditor of the estate. Then, the true heir is not released and the payer can recover. For where someone receives what is due to him, but in fact it is not due from the person who pays, recovery is allowed. 2. Wrongly thinking I owe, I pay with coins which are part mine and part someone else's. My *condictio* goes for half the sum, not half of each coin. 3. I think I owe either Stichus or Pamphilus when I actually owe Stichus. I hand over Pamphilus. I can recover under the head of payments not due. I am not deemed to have offered a substituted performance of my debt. 4. If two debtors, owing ten, both pay and so pay twenty, Celsus holds they can recover five each because since they have paid twenty when they owed ten, both can recover the amount both have overpaid.

20 JULIAN, *Digest, book 10:* If a principal debtor and his verbal guarantor both pay at once, their case is not different from that of two co-promisors. Hence, what has been said of these must be applied to them too.

21 PAUL, *Questions, book 3:* Suppose you make two parties liable to you not in respect of one and the same sum of money but of another obligation, as, for instance, to give Stichus or Pamphilus, and both are given at once, or to give a toga or a thousand denarii. Clearly, it is not possible to apply the same rule as to recovery, namely that they recover shares of the excess, since the initial performance could not have been done like that. Hence, in this case the creditor has an election whom to repay, which will bar recovery by the other.

22 POMPONIUS, *Sabinus, book 22:* Suppose I think I have promised a performance to you or Titius when I am either wrong as to both limbs or the name of Titius was not included in the stipulation. Then I pay Titius. I can recover from Titius. 1. I mistakenly deliver land to you free of a right of way which I ought to have retained. I can bring the *condictio* for an unquantified performance to compel you to grant the right of way.

23 ULPIAN, *Sabinus, book 43:* Pomponius puts this nice question: Is there room for recovery where someone supposes a compromise has been made by the person to whom he is either heir or procurator and makes a payment on the basis of that compromise, which never happened? He holds that recovery lies in that the transfer is made on a false basis. I think the same is to be said in the case of a payment on account of a compromise which fails to materialize, and the same again where a compromise is rescinded. 1. If someone settles after judgment and pays, he can still recover because it has been held that the settlement is invalid. That is what was held by a rescript of the Emperor Antoninus and his deified father. Yet the payment made under such a settlement is subject to rights of retention and set-off in any action upon the judgment. What if there is an appeal or the very thing about which there is doubt is whether judgment was given or whether the decision is valid? The better view is that the settlement then takes effect. For it ought to be understood that the area in which the rescript operates is where there is a settlement following a judgment which is undoubted and by no means open to challenge. 2. Again, recovery lies for anything given under a settlement reached in respect of aliment left by a will; for such a settlement is invalidated by *senatus consultum.* 3. Suppose that after having settled someone is nevertheless condemned. That must happen from fraud, but the judgment is still valid. In the case of settlement before joinder of issue, one can meet an attempt to join issue with a defense of fraud, and even after joinder, it is still possible to rely on the defense of supervening fraud. For it is fraudulent deliberately to set out to get more after a settlement has been reached. Hence, after condemnation the money paid on the basis of the settlement is recoverable. It is true that this is a giving upon a basis and that recovery is not granted where the basis of such a giving does materialize. But here it does not, for the settlement is not effectuated. When recovery begins, the defense of settlement gives way; for it is not right that both the defense and the right of recovery should coincide. 4. Recovery must be said to lie in respect of a payment made by someone on the mistaken basis that he was caught by a statute which imposed an immediate liability for a double or quadruple penalty.

24 ULPIAN, *Sabinus, book 46:* Where someone is entitled to a perpetual defense and, knowing that the defense will work to his advantage, promises something in exchange for his discharge, he cannot maintain the *condictio.*

25 ULPIAN, *Sabinus, book 47:* On a debtor's behalf, two people give verbal guarantees of ten. Then, the debtor pays three and afterward the guarantors each pay five. It has been held that the last to pay can recover three. That is right, because once three were paid by the debtor, only seven remained due and, when those had been paid, three more were given which were not due.

26 ULPIAN, *Edict, book 26:* One who pays, not principal, but interest which is not due cannot recover if the principal, which is owed, is unpaid. However, if he pays interest above the statutory measure, there is a rescript of the deified Emperor Severus which holds—and this is the law we use—that though he cannot recover, his payment is to be counted toward the principal, so that if he later pays the principal, he can recover it as not owed. Hence, even if the principal is paid beforehand, interest above the statutory rate can be recovered as though it were principal not due. What if both are paid at once? It can be said that recovery lies there too. 1. Interest at rates above double and interest upon interest cannot be stipulated for or demanded and, if paid, can be recovered. Similarly interest on future interest. 2. If someone wrongly believes he owes a principal sum and pays interest, he can recover by *condictio* and will not be held knowingly to have paid money not due. 3. We understand a payment not to have been due not only when it is altogether not owed but also when a claim to it is barred by a perpetual defense; for that too can be recovered, unless the payer knows the defense protects him. 4. I owe one hundred, but thinking I owe two hundred, I make over land to that value. Marcellus, in the twentieth book of his *Digest,* writes that I can recover and that the stipulation for one hundred remains in force. For, though it is held that the giving of property in place of money does discharge, yet where a thing of too great value is given because of a wrong notion of the amount of the debt, there is no appropriation of part of the thing to the money due; for ownership in common is never forced on anyone against his will. Hence, a *condictio* lies for the whole thing and the obligation remains untouched. However, the land can be retained until the money is paid. 5. The same Marcellus holds that where one who owes money gives oil of too great a value because he thinks he owes more, the excess, not the whole amount of oil, is to be recovered, the initial obligation being thereby extinguished. 6. Marcellus also adds that where part of an estate is owed to me and on the misassumption that the whole is due a valuation is made and the entire price of the estate is paid over, recovery lies not for the whole but only for the part of the price not owed. 7. A perpetual defense so effectively gives a *condictio* that Julian writes in the tenth book that if the purchaser of land ordains that his heir shall discharge the vendor from the bond of sale and then the vendor, not knowing this, hands the property over, the *condictio* lies to the vendor to recover the land. The same applies where a creditor ordains that his heir shall discharge a debtor, and he, not knowing it, pays. 8. One who, being in debt in respect of the *peculium,* pays a son-in-power does obtain his discharge so long as he does not know that the *peculium* has been taken from him. If he knows and pays, he has no *condictio* because he is one who knowingly pays what is not owed. 9. A son-in-power is lent money contrary to the *senatus consultum Macedonianum.* He then becomes heir to his father and wants to vindicate the coins. He will be defeated in his *vindicatio* by a defense. 10. If one pays because one wrongly assumes oneself to have been condemned after a submission to arbitration, recovery is possible. 11. The *condictio* for recovery of what is not owed goes against the person in the position of heir or *bonorum possessor,* provided he is defending the estate. If he is not, even payments which are owed can be recovered. 12. A

freedman does day works for his patron in the belief that he owes them. Julian writes in the tenth book of his *Digest* that he cannot bring the *condictio* despite the belief that he was bound. For the freedman owes a natural obligation to his patron to do day works. But even supposing the day works are not done and that instead, when called upon to do his duty, he arrives with his patron at a commutation into money and pays that, still he cannot recover. Suppose, however, that the work he does for his patron is not that which falls within the bond of personal duty but is rather in the nature of a craft sounding in contract, as painting or such like, which he does under the impression that he is liable to do it. Then, there is a question to be asked whether he can bring the *condictio*. Celsus, in the sixth book of his *Digest*, thinks that the point about day works is that they differ both in content and according to the person of either worker or recipient. Indeed, very often the strength and age of the freedman and the natural exigences of the moment fundamentally affect the day works, so that with the best will in the world they cannot be done. However, these works do, he says, admit of valuation. He also points out that it does happen on occasion that we can bring a *condictio* for something different from what we handed over. For instance, I give land not owed and bring a *condictio* for its fruits; or I give a slave not owed, and you sell him honestly for a small sum in which case you certainly need only give back what you have left from the price; or again, if I have made a slave more valuable by expenditure upon him, must not this too be valued? In this way he concludes that in the case put, the freedman must have his *condictio* for as much as I would have spent to hire the services. Marcellus, in the twentieth book of his *Digest*, raises the case in which a freedman is told by the patron to offer to another those day works within his bond of duty. And Marcellus holds him not liable, unless, for instance, he has a special skill in which case the patron's order binds him to offer his work to a third party. However, if after the assignment he does do the works which fall within his duty, he cannot bring a *condictio* either against the creditor for whom he does them, for whom he performs by reason of another's call upon him and who only receives his due, or against his patron, since to him he owes a natural obligation. 13. Bound by stipulation to give ten or Stichus, I pay five. Can I bring the *condictio*? The question comes down to this: Am I released as to five? If so, I cannot use the *condictio*; if not, I can. It has been held, as is written by Celsus in the sixth book of his *Digest* and by Marcellus in the twentieth book of his *Digest* that the half part of the obligation is not extinguished and that the payer of five must therefore be considered as leaving it open whether he will or will not in the end be released; the remaining five or Stichus can be claimed from him, and if he pays the balance of five, the first five will be understood to have been paid as owed, while if he gives over Stichus, he will be able to bring a *condictio* for the five as for money not owed. In this way, the subsequent performance determines the quality of the earlier payment of five as owed or not owed. Celsus raises the question, whether I can be heard to say, when delivery of Stichus follows payment of the five, that I prefer to keep the five and give back Stichus. His view is that the *condictio* for five is already activated, though I would be given the right to choose which to keep in the case of simultaneous performance of both alternatives. 14. The same jurist holds that where the stipulator has two heirs it is not permissible, after giving five to one, to give the other a share in Stichus. The same applies where there are two heirs to the person who makes the promise. This leads to the conclusion that discharge requires that each be given five or each a share in Stichus.

27 PAUL, *Edict, book 28:* One who pays what is not owed in the belief that he owes it at a certain place may recover anywhere; for the mode of recovery is not controlled by the payer's beliefs.

28 PAUL, *Edict, book 32:* If a defendant who has been wrongly absolved by a judge voluntarily pays up, he cannot recover.

29 ULPIAN, *Disputations, book 2:* The cause for recovery is on occasion to be found in the character of the payer, as for instance, when a *pupillus* pays without his tutor's authority or a lunatic or one banned from dealing with his property. There is generally

no argument against recovery in the case of people such as these. In fact, if the coins still exist they can be vindicated, while if they have been used up, the *condictio* lies.

30 ULPIAN, *Disputations, book 10:* Suppose a payment made by one who is both debtor and creditor. In those cases in which set-off is inapplicable, his remedy is not by the *condictio* for what is not owed but rather by suit for the debt owed to him.

31 ULPIAN, *Opinions, book 1:* One who mistakenly enters a *cautio* to a creditor for a sum greater than is warranted by his share of an inheritance has a *condictio* for the amount promised and not owed.

32 JULIAN, *Digest, book 10:* Suppose that one who owes Stichus or Pamphilus gives up both of them and then, after they have been given, one or both depart this life. He will recover nothing; for whatever survives is appropriated to performance. 1. By an oversight a guarantor pays up after there has been an agreement that he shall not be sued. He can bring the *condictio* against the stipulator, and the principal debtor therefore remains liable. The guarantor himself retains the protection of his defense. Further, it does not matter whether the guarantor himself pays or his heir; but if the principal debtor is the guarantor's heir and he pays, there is no recovery and he obtains his release. 3. If a woman labors under the belief that she is bound to provide a dowry, she cannot recover anything given on that account; for beneath the wrong belief, there remains the moral bond, and a payment grounded on that cannot be reclaimed. 3. One who promises to give an unspecified slave is much in the position of one who owes either a slave or ten. Hence, if he thinks he has promised to give Stichus and delivers him, he can bring the *condictio*, but he can obtain his discharge by giving any other one he likes.

33 JULIAN, *Digest, book 39:* If I build on your site and you possess the house, there is no room for a *condictio* because there has been no dealing between us. For one who pays what is not owed does go through a kind of transaction by the act of paying. But when an owner takes possession on his own land of a building, placed there by another, he enters no transaction. Further, if one who builds on another's site himself yields up possession, he cannot use the *condictio* because he vests no property in the recipient. Rather, the owner begins to hold his own property. Hence, it is agreed that if someone imagines himself heir and decorates a block of flats belonging to the estate, the only way he can get his expenses is by exercising his lien.

34 JULIAN, *Digest, book 40:* Some one is given a whole estate under a *fideicommissum* and is also given a plot of land on condition he pays ten to the heir; then the heir declares the estate unsafe and hands it over under the *senatus consultum Trebellianum.* Since there is no basis now for the payment of money, he can bring the *condictio* for anything given to fulfill the condition.

35 JULIAN, *Digest, book 45:* Once one has paid on account of failure to defend a suit, one cannot recover what has been given, not even if later willing to defend.

36 PAUL, *Epitome of the Digest of Alfenus, book 5:* A slave belonging to someone lent a plate without his master's knowledge. The borrower pawned the plate and disappeared. The pledgee said he would only give it back if he got his money. The poor slave paid him, and he gave back the plate. Could the money be recovered from the pledgee? His reply was that if the pledgee knew that the plate pawned with him belonged to a third party, he became liable for theft, with the result that where he took money from the slave for the buying back of stolen property, a claim for recovery would lie against him; on the other hand, if he was unaware that the pledge belonged to a third party he was not a thief; so, too, when he received money on account of the pledgor but paid by the slave, there could be no recovery from him.

37 JULIAN, *Urseius Ferox, book 3:* I mistakenly buy my slave from you and pay the money. I hold that I can at all events recover the money from you by means of the

condictio, whether you knew him to be mine or not.

38 AFRICANUS, *Questions, book 9:* One brother borrowed money from another while both were still in power, and he repaid after their father had died. Could he recover? The reply was that he could certainly recover a part measured by the size of his share as heir to his father's estate; as for the part referable to his brother's share as heir, he could only recover that if a transfer of no less an amount had previously been made from his *peculium* to his brother, the natural obligation subsisting between them being deemed to be discharged by the very fact of the brother's receiving part of his *peculium*—and this would be carried to the extent of holding that if the *peculium* had been given to the son who owed the debt as a legacy taking priority over division of the inheritance, still his brother would have been able to deduct the amount of this debt. The above conclusion is implicit in the opinion approved by Julian that if he had owed something to an outsider and had been made to pay after the father's death, he would, by action for the division of an inheritance, recover from his co-heirs the amount which the creditor would have been able to recover from them by the action on *peculium*. Hence, if the action for dividing an inheritance is brought before these adjustments are made, it is just that the *peculium* should be divided in such a way as to ensure that his co-heir indemnifies him up to its amount. Moreover, one who ought to be protected against the outsider ought all the more to be indemnified in respect of debts owed to his brother. 1. If a father lends to his son, who repays after emancipation; can the son recover? Answer: If the father has kept back none of the *peculium*, there is no recovery. In fact, the proof of the subsistence of the natural obligation is that the father can still deduct the debt due to him from his son if within the year an outsider brings an action on the *peculium*. 2. Turning the parties round, if a father pays a debt to his son after emancipation, he cannot recover. Here too the subsistence of the natural obligation is demonstrated in the same way, for if within the year an outsider sues by action on *peculium*, account is taken of the sum owed by the father to the son. The same applies where a *heres extraneus* pays a debt owed by a father to a disinherited son. 3. I was given security for a legacy, and the guarantor paid me. Afterward it turned out the legacy was not due. The opinion was that he could recover.

39 MARCIAN, *Institutes, book 8:* According to a rescript of the deified Emperors Severus and Antoninus, one who fails to take a *cautio* from a *fideicommissarius* when he could have done so can recover, on the theory of payments not owed, any sum paid in excess of his liability.

40 MARCIAN, *Rules, book 3:* One who has a perpetual defense can recover if he pays by mistake. But this is not invariable. For if the defense is given in the interest of the defendant, a payment can be recovered, as happens in the case of the *senatus consultum* on suretyship. On the other hand, when the defense is given out of hostility to the creditor, a wrong payment is not recoverable; so for instance, a son-in-power who borrows money contrary to the *senatus consultum Macedonianum* and repays after becoming head of a household cannot recover. 1. Suppose that part of a house which has been left under a *fideicommissum* postponed to a given day burns down before the day on which the *fideicommissum* takes effect. If the heir makes the house good at his own expense, it is agreed that the amount he spends is to be deducted from the *fideicommissum* and that if he hands over the house without making that deduction, he can bring the *condictio* for an unfixed amount on the theory of having given more than was owed. 2. If a pact is made between a freedman and his patron to the effect that day works will not be demanded, the freedman can recover in respect of any performance subsequently made by him.

41 NERATIUS, *Parchments, book 6:* What a *pupillus* promises a stipulator without his tutor's authority can be recovered if paid; for there is not even a natural obligation.

42 ULPIAN, *Edict, book 68:* Penalties are not normally recoverable once paid.

43 PAUL, *Plautius, book 3:* If someone swears he is under no obligation to give, all aspects of the dispute are to be abandoned, so that it must be held that money paid can be recovered.

44 PAUL, *Plautius, book 14:* No recovery is possible against a man who has received his own property, even from a person other than a true debtor.

45 JAVOLENUS, *From Plautius, book 2:* One who sold an inheritance and handed it over to the buyer omitted to hold back the amount of a debt owed to himself by the deceased. He can reclaim, because payments in excess of what is owed are rightly recovered by the *condictio.*

46 JAVOLENUS, *From Plautius, book 4:* Someone, acting on account of the heir and with coins belonging to the heir, pays out legacies which are not due. The payer himself cannot recover. However, he says that if the heir's coins were handed over without the knowledge of the heir, their owner will be able to vindicate them. The same applies to all corporeal things.

47 CELSUS, *Digest, book 6:* You mistakenly promised money you did not owe. Your guarantor paid. My opinion is that if the guarantor paid on your behalf, you come under an obligation to him and the stipulator to you. There is no need to wait for ratification because you impliedly authorized this very thing, namely payment on your account. On the other hand, if it was on his own account that the guarantor paid what he did not owe, he himself can recover from the stipulator, since that is a straightforward case of a payment not due. However, the amount he fails to recover from his payee he will get from you by action on mandate, so long as he was unaware that he could have defeated the claim against him by pleading a defense.

48 CELSUS, *Digest, book 6:* Suppose a person promises to give ten if something is done by him or when it is done, and then before the thing is done, he makes the promised performance. He is not regarded as having done as he promised and can therefore recover.

49 MODESTINUS, *Rules, book 3:* The *condictio* goes only against those to whom one way or another payment is made, not against those deriving benefit through a payment.

50 POMPONIUS, *Quintus Mucius, book 5:* One who pays knowing he does not owe but with the intention of recovery later cannot recover.

51 POMPONIUS, *Quintus Mucius, book 6:* In situations in which we have a lien but no active claim, if we release the lien, we cannot get it back.

52 POMPONIUS, *Quintus Mucius, book 27:* We give either on a basis or for a purpose. An example of giving on a basis founded in the past is where I give because I have obtained something from you or because something has been done by you. Here there is no recovery even though the basis proves false. But a giving for a purpose is done in order that something shall happen and if it does not happen, recovery lies.

53 PROCULUS, *Letters, book 7:* An owner granted his slave freedom by will, conditionally upon payment of ten. The ten were paid to me, the slave being unaware of the invalidity of the will. Who can recover? Proculus gives this reply: If the slave himself used coins from his *peculium,* not having been authorized to do so by the owner, the property in the coins remains in the owner, so that recovery should be by action *in rem* not by *condictio.* If, however, someone else used his own coins, at the request of the slave, the property in them passed to me, and the owner of the slave on whose account they were given can sue by *condictio.* But it is kinder and more sensible to let the payer himself have a straight path to recover his own.

54 PAPINIAN, *Questions, book 2:* In all these situations in which transactions are invalid or deprived of effect mistaken payments made under them can be recovered by *condictio.*

55 PAPINIAN, *Questions, book 6:* If a usurper hires out urban land, he will not be liable to return to the payer whatever he gets as rent, but will come under an obligation to the owner. The same rule applies to the freight of ships which he hires or runs, also to the wages of slaves whose services he hires out. In fact, if a slave not hired out pays over his wages to the usurper as to his owner, he will not pass the property in the money to him. Suppose then that he receives the rent of a block of flats or the freight

of a ship when the owner has done the hiring. In that case, he will be liable for money not owed to the payer who himself is not discharged by his payment. Hence, what is usually said about the *condictio* lying against a usurper for fruits applies in the case in which the fruits belonged to the owner.

56 PAPINIAN, *Questions, book 8:* Where it is uncertain whether a defense is permanent or temporary, a payment does still qualify as not due. Suppose a pact that someone shall not be sued till Titius becomes consul. The death of Titius will make perpetual the defense which his obtaining the consulate will show to have been temporary. Sound reasoning will conclude that a payment meanwhile is recoverable. For just as a pact which looks to a fixed time no more gives rise to a *condictio* than a payment by a debtor after time, so with equal certainty a legal defense whose nature is undecided assumes the aspect of a condition.

57 PAPINIAN, *Replies, book 3:* When a tutor pays money not owed on behalf of an *impubes*, the *impubes* has the *condictio*. 1. A creditor gives a mandate for a debt to be paid to his procurator. If too much money is paid, an action for money not owed lies against the procurator. But if the creditor expressly authorized this payment of the too large sum, an action for payment not owed can be brought against him; which action is not held to be extinguished if a fruitless suit has been instituted against the procurator.

58 PAPINIAN, *Replies, book 9:* The deceased left a *fideicommissum* to a manumitted slave conditionally upon his achieving freedom under the will. Without the matter going before a judge, he is given the money. Then, he is pronounced freeborn. The *fideicommissum*, not due to him, is recoverable.

59 PAPINIAN, *Definitions, book 2:* If a guarantor discharged by operation of law mistakenly pays the money, nothing will obstruct his claim for recovery. However, if the principal debtor then himself mistakenly pays the money again, he cannot recover. The reason is that the first payment, which was vitiated, did not discharge the natural obligation, nor the civil either, if the principal debtor was so bound.

60 PAUL, *Questions, book 3:* Suppose a genuine debtor pays after joinder of issue while the trial is still on. Julian says he cannot recover, since he would not be able to if he were absolved or if he were condemned; for even if he is absolved, the natural debt survives. He holds this similar to the case of one who promises, "if the ship comes in from Asia or if it does not," since either event will trigger the other basis for performance. 1. However, where someone intending to effect a novation makes a conditional promise of a debt owed unconditionally, many think that a payment while the novation is suspended is recoverable, because it is still unclear to which obligation the performance is attributable. Also, they say the same applies if you suppose different people promising the same money unconditionally and, to achieve novation, conditionally. But that is a different case. For it is certain that the debtor will be the same under both the conditional and the unconditional stipulations.

61 SCAEVOLA, *Replies, book 5:* Tutors of a *pupillus* paid some of the father's creditors out of the father's estate but then, finding the estate insufficient, withdrew the *pupillus*. Ought the creditors to give back this excess paid by the tutors of the *pupillus* or the whole amount they received? My opinion was that in the absence of fraud they owed nothing to the tutor or to the *pupillus*, but that they were liable to the other creditors in respect of the amount by which their debts had been too generously met.

62 MAECIANUS, *Fideicommissa, book 4:* Once a stipulation has been taken for a *fideicommissum*, it becomes due even if not due originally, because the promise is knowingly given to fulfill the trust.

63 GAIUS, *Cases, sole book:* Neratius gives a case in which there is no recovery of what has been given because, although the giving effects no discharge, what is given is owed. So suppose one is bound to give a certain slave and gives him when *statuliber.* There he does not get his discharge because he fails to transfer the entire property in the slave to the stipulator; but he cannot recover, because what he gives he does owe.

64 TRYPHONINUS, *Disputations, book 7:* Suppose an owner has a debt to his slave and pays it after manumission. He cannot recover, not even if he believed the other could sue him by some action; for his payment acknowledges his natural indebtedness. For in the sense that freedom is the condition of natural law and subjection the invention of the law of the world, so for the *condictio* the question whether there is or is not a debt is to be taken on the natural plane.

65 PAUL, *Plautius, book 17:* In short, if we are to consider the main lines of restitution, we must know that every giving is on account of a settlement, a basis, a condition, a purpose, or a supposed debt. 1. Now what is given on account of a settlement is not recoverable, even though there was nothing in the dispute because where there is a suit, the very abandonment of it is held to be a sufficient basis. Yet recovery will be possible if a claim is found to be clearly vexatious and the settlement is void. 2. Further, that which is given on such a basis as, say, that I thought the donee had rendered me a service in a business connection when in fact he had not, cannot be recovered, because I wanted the gift to be made, albeit I brought myself to it for wrong reasons. 3. But I can bring a *condictio* to recover what I have given on account of a condition for obtaining a legacy or inheritance if it turns out the legacy is not mine or is adeemed. The reason is that I did not give with transactional intent, since the basis on which I gave never materialized. The same applies if I am unwilling or unable to enter the inheritance. Suppose, though, that my slave is instituted heir subject to a condition and that I pay up and then he enters the inheritance after having been manumitted. There the same cannot be said, for in that event, the basis of the giving does materialize. 4. When there is a giving to achieve a purpose, restitution is grounded on the idea of what is good and fair, as when I give to get you to do something and you do not do it. 5. The plaintiff in the case of a supposed debt ought also to obtain restitution in respect of fruits and offspring, a deduction being made for expenses. 6. In a case of corn given when not due, quality must be taken into account, and where the corn is consumed, the value is recoverable. 7. Thus, if it is habitation that has been given, my *condictio* lies for money, not indeed for the amount it might have been hired out for, but the amount you would have paid to hire it. 8. If I have given you a slave not due, and you have manumitted him, you will be liable for his price if you acted knowingly; if unknowingly you will not be liable, though you must make restitution in respect of his day works as a freedman and rights of succession to him. 9. Payments not due include not only the case in which nothing is due at all but also those in which something is due to one but is paid to another or due from one but is paid by another thinking himself the debtor.

66 PAPINIAN, *Questions, book 8:* This *condictio,* grounded in the idea of what is good and fair, has become the means of reclaiming whatever, belonging to one in the absence of good cause is found in the hands of another.

67 SCAEVOLA, *Digest, book 5:* Under the will of the man he supposed to be his owner, Stichus received his freedom subject to the condition of paying the heirs ten a year for ten years. He paid the prescribed sum for eight years. Then, he found out that he was freeborn, and he did not pay for the remaining years. It was pronounced that he was freeborn. Question: Could he recover the money he had paid the heirs as money not due, and if so, by what action? Answer: He could recover provided the money he paid had not been earned either for his own work or from the substance of the person whom he served in good faith. 1. A tutor paid the creditor of his *pupillus* more than was due and, in the action on tutelage, did not charge the excess to the *pupillus.* Question: Can he have restitution from the creditor? Answer: He can. 2. Having

many creditors, one of whom was Seius, Titius transferred his property to Maevius by way of privately concluded sale to enable Maevius to satisfy the creditors. But Maevius paid money to Seius as owed which Titius had already paid him. Question: When receipts are later found with Titius, the debtor showing the money partly paid, who can recover the money paid but not due? Titius, the debtor, or Maevius, appointed procurator in his own interest? Answer: On the facts as stated the second payer recovers. 3. The same questioner asked whether the term usually written into settlement of accounts on the lines—"arising from this transaction there is no dispute outstanding between the parties"—would obstruct recovery. The answer was: Nothing had been mentioned which could obstruct recovery. 4. Lucius Titius lent a certain sum of money to Gaius Seius, who was under the age of twenty-five, and received from him something by way of interest. The heir of Gaius Seius, the *minor*, obtained *restitutio in integrum* against Publius Maevius from the provincial governor, so that the debt did not have to be paid. However, nothing was said before the governor or pronounced by him in relation to recovery of the interest on the principal which Seius paid out under the age of twenty-five. Question: Can the heir have recovery of the interest which Gaius Seius being under twenty-five paid to his creditor while he still lived? Answer: According to what had been said a *condictio* for the payments by way of interest made by the deceased would not lie. Another question: If you think the heir cannot recover, can he withhold the amount from another debt? Answer: Not even that.

7

THE *CONDICTIO* FOR NO FIXED CAUSE

1 ULPIAN, *Sabinus, book 43:* There is also this kind of *condictio* for the case in which someone makes a promise with no basis or pays what is not owed. But one who promises with no basis cannot bring a *condictio* for the amount promised but for the obligation itself. 1. Further, if he gives a promise on a basis which fails to materialize, the *condictio* must be said to lie. 2. Whether the basis of the promise is absent from the start or is present but fails to endure or fails to materialize, the *condictio* must be said to lie. 3. It is agreed that the *condictio* can only go against someone for something which came to him other than on a legally sufficient basis or comes to be referable to a basis which is not legally sufficient.

2 ULPIAN, *Edict, book 32:* A cleaner takes a laundry contract, and then when the clothes have gone missing, he is sued by the owner in an action on hire and pays up their price. Then the owner finds the clothes. By what action should the cleaner recover the price he paid? And Cassius holds that he can not only sue by action on hire but can also maintain a *condictio* against the owner. I think he can definitely bring the action on hire. It has, however, been doubted whether he can also have the *condictio*, in that what he gave was not something not owed. Yet maybe we can hold him able to have the *condictio* as for something given without any basis. For once the clothes are found, it does seem as though the giving had no basis.

3 JULIAN, *Digest, book 8:* Those who come under an obligation without any basis can obtain their discharge by the *condictio* for an unquantified claim. It is immaterial whether the whole obligation has been undertaken without basis or only a greater obligation than necessary, except that in the one case the aim of the *condictio* is total

discharge and in the other reduction of the burden. Take the case of one who promises ten. If he had no basis at all for promising, by means of the *condictio* for an unquantified claim, he will obtain discharge of the whole stipulation; on the other hand, if he promised ten when he ought to have promised five, what he will get though the unquantified *condictio* is discharge as to five?

4 AFRICANUS, *Questions, book 8:* There is no material difference between the case in which a giving has no basis from the beginning and that in which the basis upon which the giving happens fails to endure.

5 PAPINIAN, *Questions, book 11:* A woman gave a money dowry to her uncle whom she was going to marry, but she did not marry him. Can she recover it? I said that when money is paid over on a basis the evil character of which taints both giver and recipient, the *condictio* will not lie, and that where parties are equally in the wrong the possessor is the stronger; that following this reasoning one might hold that the woman could not have the *condictio*, but that it was correct to object that in the case as given there was no basis at all and hence no evil basis, since it was impossible for the money which was given ever to become a dowry, the point being that it was given not for improper sexual relations but for marriage. 1. A money dowry is given by a stepmother to a stepson or by a daughter-in-law to a father-in-law, and no marriage follows. It seems at first sight that the *condictio* is excluded because this is by the law of the world incest. However, it is certainly more correct that in such a case there is no basis at all for a dowry to be given. Whence the *condictio* lies.

BOOK THIRTEEN

1

THE *CONDICTIO* FOR THEFT

1 ULPIAN, *Sabinus, book 18:* In relation to stolen things, the *condictio* is available only to the owner.

2 POMPONIUS, *Sabinus, book 16:* Although lunatics and infants cannot be impleaded, they are bound by the *condictio* for theft if they become *heredes necessarii.*

3 PAUL, *Sabinus, book 9:* If a slave is claimed by the *condictio* for theft, it is certain that account is taken of the plaintiff's full damages, as, for instance, where the slave has been appointed heir and the master runs the risk of losing the inheritance. Julian also writes to this effect. He, likewise, holds that one who brings a *condictio* for a slave who has died will obtain the value of the inheritance.

4 ULPIAN, *Sabinus, book 41:* If a slave or son-in-power commits theft, a *condictio* will go against the master for whatever has come to him. In respect of the balance, the master can make noxal surrender of the slave.

5 PAUL, *Sabinus, book 9:* The *condictio* for theft can go against a son-in-power. For nobody is ever liable to that *condictio*, except the perpetrator of the wrong or his heir.

6 ULPIAN, *Edict, book 38:* This is taken to the extent of holding that an accomplice to theft, though liable to the action on theft, is not liable to the *condictio.*

7 ULPIAN, *Sabinus, book 42:* The fact that someone meets his liability as a thief does not obstruct the *condictio.* That is the correct view. For the settlement extinguishes the action on theft but not the *condictio.* 1. The action on theft goes for the statutory penalty, the *condictio* for the thing itself. That distinction means that the action on theft is not extinguished by the *condictio.* Nor vice versa. Hence, the victim of theft has the action on theft, the *condictio* and the *vindicatio.* And he has the action for production too. 2. Because the *condictio* for a stolen thing has the aim of recovering the asset, it also binds the thief's heir, and not only while the stolen slave is still alive but also after he has died. Moreover, it is right to say that the *condictio* endures against the heir both in the case in which the stolen slave meets his end in the hands of the thief's heir and where he dies after the thief's death, albeit not in the hands of the heir. What we have said of heirs applies also to other successors.

8 ULPIAN, *Edict, book 27:* In the context of theft, the *condictio* lies for the very things stolen, but does it lie only so long as they still exist or even after they have perished from the face of the earth? Without doubt there will be no *condictio* if the thief tendered them. If not, the *condictio* survives for the value since the object itself cannot be made over. When something is claimed by *condictio* for theft, as at what time should its value be taken? There is authority for taking the time when its value was highest, which seems all the more right given that a thief cannot discharge himself by returning the thing in a deteriorated condition. For a thief is deemed always in

delay. 2. Lastly, it is to be observed that fruits also are included in this action.

9 ULPIAN, *Edict, book 30:* In the *condictio* for theft, we are liable, if we are sole heirs, for the whole amount, not just for what comes into our hands. But the liability of an heir to a share of an inheritance is proportionate to that share.

10 ULPIAN, *Edict, book 38:* Whether the thief is manifest or not manifest, the *condictio* goes against him. But the manifest thief is only subject to the *condictio* so long as the owner has not retaken possession from him. Indeed, no kind of thief can be liable under the *condictio* once the owner has recovered possession. Hence, Julian supposes for the purpose of his discussion of the *condictio* against manifest thieves that the captured thief has killed or broken or poured away whatever it was he took. 1. Julian also indicates in the twenty-second book of his *Digest* that the *condictio* can be brought against one liable for robbery. 2. The *condictio* continues to lie until by his own act the owner is divested of title to the thing. Hence, if he alienates the thing, he cannot bring the *condictio.* 3. Thus Celsus writes in the twelfth book of his *Digest* that if an owner gives the stolen property to the thief as an unconditional legacy, the heir cannot maintain the *condictio* against him. But the same applies even when the legacy is not to the thief but to someone else: The *condictio* lapses because by the act of the testator, that is to say of the owner, ownership has passed away.

11 PAUL, *Edict, book 39:* Note, however, that the legatee cannot maintain the *condictio,* which lies only to the person from whom the property was stolen or to his heir. But the legatee can have the *vindicatio* against the thief for the property bequeathed.

12 ULPIAN, *Edict, book 38:* Marcellus, therefore, seems to sum it up neatly in the seventh book where he says that you will have the *condictio* when you keep title to property stolen from you, and when you lose title other than through your own act, you still have the *condictio.* 1. Thus, in the case of property in common ownership, he makes the nice distinction according as you called the other to an action for dividing common property or he called you: If you called him to the divisory action, you lose your *condictio;* if he called you, you keep it. 2. In his work called *Parchments,* Neratius reports Aristo as holding that a pledgee from whom the pledge was stolen would have the *condictio* for an unfixed claim.

13 PAUL, *Edict, book 39:* Fulcinius holds that the *condictio* can be brought for cups made out of stolen silver. It follows that in a *condictio* for cups the valuation should take account even of engraving effected at the thief's expense, just in the same way as when a baby is stolen and grows up, it is of the young man that valuation is made even though his upbringing has been at the care and cost of the thief.

14 JULIAN, *Digest, book 22:* If there is a conditional legacy of a stolen slave, the heir has the *condictio* so long as the condition remains open. If the condition is satisfied after joinder of issue, absolution must follow, just as in the case in which the slave is conditionally made free and that condition is satisfied after joinder. For the plaintiff no longer has any interest in the recovery of the slave and the subject matter has passed out of his ownership without fraud on the thief's part. If judgment is given while the condition is still open, the judge should base his valuation on the price at which the plaintiff could find a buyer. 1. There is, however, no need in this action for the plaintiff to give security to the defendant. 2. If a cow is stolen and killed, the *condictio* lies to the owner for the cow and the hide and the meat, provided, that is, that both the hide and meat were theftuously handled. The *condictio* will go for the horns too. However, if the owner's *condictio* obtains for him the price of the cow, and then he later begins a *condictio* for one of those other things mentioned above, his claim must at all events be defeated by a defense. On the other hand, if after claiming the hide and

obtaining its value, he brings a *condictio* for the cow itself he will be defeated by the defense of fraud if the thief tenders the value of the cow less the value of the hide. 3. The same rule applies to stolen grapes; for both juice and grape skins can rightly be made subject of a *condictio*.

15 CELSUS, *Digest, book 12:* When a slave steals something from someone, he is liable for it, if he becomes free, in the action on theft, but the *condictio* will not go against him unless theftuous handling occurred when he was free.

16 POMPONIUS, *Quintus Mucius, book 38:* Suppose a man commits theft by his use of something lent or deposited. He becomes liable to the *condictio* for theft as well. That differs from the action on loan for use in making him liable even if the thing perishes without fraud or fault on his part. By contrast in the action on loan for use the defendant cannot easily be made to answer for anything beyond what happens by his fault, and in the action on deposit the depositee-defendant likewise not beyond fraud.

17 PAPINIAN, *Questions, book 10:* For the purpose of discharging the *condictio*, it is all the same whether the stolen slave is delivered up or a substitution is effected to a changed debt or different degree of obligation; and I do not think it relevant to ask whether the slave was or was not present because this variety of substitution puts an end to the state of delay arising from the theft.

18 SCAEVOLA, *Questions, book 4:* Since it is theft knowingly to receive coins which are not owed, it is a question whether if my agent pays with his own coins, the theft is committed against him. And Pomponius, in the eighth book of his *Letters*, holds that he can himself bring the *condictio* for theft but also that I can have the *condictio* if I ratify his payment of what was not due. However, the one *condictio* excludes the other.

19 PAUL, *Neratius, book 3:* Julian gave a reply to the effect that in respect of a daughter who removed her husband's property, a *condictio* should be given against her father, limited to the *peculium*.

20 TRYPHONINUS, *Disputations, book 15:* Even though the thief was ready to defend the *condictio* and I was well able to maintain the action while the property, later destroyed, was still in existence, yet the earlier jurists thought it right that the *condictio* should still lie. The reason is that once someone has committed a theftuous handling of property without the owner's consent, he is held always to be in delay in the matter of restoring that which he never ought to have carried away.

2

THE *CONDICTIO* UNDER STATUTE

1 PAUL, *Plautius, book 2:* If a new obligation is introduced by a statute and no provision is made in the statute as to the kind of action we are to use, the pleading must be framed on the statute itself.

3

THE *CONDICTIO* FOR FIXED QUANTITIES

1 ULPIAN, *Edict, book 27:* One who sues for a fixed amount of money uses the action under the rubric, "if he makes a fixed claim." However, if the suit is for other things, he sues by the *condictio* for fixed quantities. It is right to make the general proposition that excepting only money all kinds of property are claimed by this action whether handled by weight or by measure and whether movable or pertaining to the realty. Hence, this action can also be used to claim land, even if held at a rent, or to claim a right which someone has stipulated for such as usufruct or a servitude belonging to one or other kind of estate. 1. However, nobody can claim his own property by this action, except under special causes which do permit this, as where the cause is theft or violent seizure of a movable.

2 ULPIAN, *Sabinus, book 18:* But Sabinus writes that a *condictio* can also be brought for land against one who has violently ejected another from it. Celsus holds the same, at least in the case where it is the owner who after ejection maintains the *condictio*. On the other hand, one who is not owner can, says Celsus, maintain the *condictio* for possession.

3 ULPIAN, *Edict, book 27:* If it is asked under this action as at what time the thing claimed should be valued, the better answer is that of Servius who says regard must be had to the time of the condemnation; however, if death has ensued, then the time of death is what counts, but understood, according to Celsus, in a wide sense. For the valuation should not focus on the very last minute of life, lest it be reduced in the case of a fatally injured slave to a miniscule price. But in either case, if the thing suffers deterioration after delay, Marcellus writes in his twentieth book that the valuation must take account of the amount of deterioration. For this reason someone who delivers up a slave blinded in one eye after delay obtains no discharge. In these cases, therefore, the valuation must be related to the time of falling into delay.

4 GAIUS, *Provincial Edict, book 9:* If goods of some kind, as, for instance, wine, oil, or corn, are claimed and ought to have been given over on a fixed day, Cassius holds that the value to be taken is that which they had on the day appointed for delivery; then, in the absence of an agreement fixing the day, the value to be taken is that obtaining at joinder of issue. The same rule applies in relation to place, so that the value is first to be taken as at the place appointed for delivery; then, failing any agreement specifying a place, regard must be had to the place where the suit is brought. This rule applies also to the rest of matters of this kind.

4

WHERE THE OBLIGATION IS TO GIVE AT A FIXED PLACE

1 GAIUS, *Provincial Edict, book 9:* It used to be thought that one had no right to sue except in the place where under the terms of the stipulation the render was to be made. However, it seemed unfair that a stipulator could not obtain his due if the promisor never came near where he had undertaken to give (which might happen on purpose or because he was tied down elsewhere). That is why it was decided to make an *actio utilis* available in this case.

2 ULPIAN, *Edict, book 27:* The discretionary action can work to the advantage of each party, as much to that of the plaintiff as of the defendant. Where it favors the defendant, the condemnation is made for a sum of money less than the amount claimed in the *intentio*, where the plaintiff, for a greater sum. 1. Now this action arises from the type of stipulation in which I have made you promise that something shall be given at Ephesus. 2. If someone sues upon a stipulation that ten shall be given at Ephesus or else a slave at Capua, his pleading must not omit one or other place lest the defendant be deprived of a geographical advantage. 3. Scaevola says, in the fifteenth book of his *Questions*, that the implied elements in stipulations certainly do not all amount to options exercisable by the debtor but that it is within his discretion to choose what he owes though not to decide whether he owes. Suppose, therefore, [he says] that someone promises Stichus or Pamphilus. So long as both yet live, he can choose which to give. If either dies, his election is extinguished. Otherwise, it would be in his power to decide whether he owed, just by choosing not to be liable for the survivor, the only remaining subject of the debt. Thus, in the case put of the men who promised to perform either at Epheusus or Capua, if it was up to him to choose where to be sued, he could never be sued at all since he would be ever about to elect for the alternative venue, and so it would come down in effect to his having power to decide whether he owed. Hence, he concludes that suit can be brought against him at either place and without place being pleaded. Therefore, we concede to the plaintiff an election as to the suit. Scaevola sums it up in the general rule that the plaintiff can choose where to sue and the defendant can choose where to pay, provided, that is, he chooses before the action is brought. By the same reasoning, he says, in a case where not only place

but also subject matter is stated in the alternative it is inevitable that the plaintiff by reason of his election as to place must have an election as to subject matter as well. Otherwise, by trying to preserve the defendant's option, you would extinguish the plaintiff's action. 4. Suppose someone stipulates for performance at Ephesus and Capua. He says the effect is to allow suit for part at Ephesus and part at Capua. 5. If someone stipulates for a building to be put up and makes no mention of a place, the stipulation is void. 6. Suppose someone stipulates for something to be given at Ephesus and then sues before enough time has elapsed to reach Ephesus. His action is wrongly brought before time, because Julian also holds that this stipulation impliedly includes a provision as to time. Thus, I agree with Julian's view that one who stipulates at Rome for something "to be given at Carthage today" makes a stipulation which is void. 7. Julian also considers the case of one who stipulates for payment at Ephesus to himself or to Titius. If payment is made elsewhere to Titius, can he still contend that there is a duty to give to him? And Julian writes that no discharge having been effected, he can sue for his damages. However, Marcellus, both in his treatment of this problem elsewhere and in his commentary on Julian, says that it is possible to hold even that payment to myself elsewhere effects discharge, although I cannot be compelled to accept against my will. Of course, if discharge is not effected, it is right to say that there survives a claim to the entire sum, just as when one builds a house in a place other than that promised he achieves no measure of discharge at all. Yet it seems to me that there is a distinction between the payment of a sum and the construction of a building and that only damages are therefore recoverable. 8. To turn now to the duty of the judge in this action: Should he keep to the figures in the contract or can he go higher or lower? So, for instance, should he take account of the fact, if such it be, that it was in the defendant's interest to perform at Ephesus rather than at the place of suit? Julian, following Labeo's opinion, considers the case of the plaintiff who can sometimes have an interest in recovery at Ephesus. Hence, the advantage of the plaintiff will also be taken into account. Suppose, for instance, that by way of investment in a voyage he gives money for return at Ephesus where he owes against a penalty or against pledges, and then the pledges are sold or the penalty is activated by your delay. Or again suppose something is owing to the imperial treasury, and the stipulator's goods are sold off very cheaply. In this discretionary action, full damages are to be taken into account even if it comes to more than the legal rate for interest. What if his business was buying goods? Should account be taken also of profit and not only of loss? I think profit too should be taken into account.

3 GAIUS, *Provincial Edict, book 9:* The reason this action rests on the discretion of the judge is that we know how prices of things vary from one city and region to another, especially of wine, oil, and corn. Even in the case of money, though it is supposed to have one and the same purchasing power everywhere, yet it can be quite easily raised and at low interest in some places, with difficulty and at steep interest in others.

4 ULPIAN, *Edict, book 27:* However, if the suit is brought at Ephesus, the sum itself can alone be claimed and nothing more unless something has been specified in the stipulation or an advantage of time comes into play. 1. On occasion, the judge trying matter under this action should, the action being discretionary, absolve the defendant after taking from him security for payment of the money at the place promised. For what if the money is said to have been offered then to the plaintiff or on deposit there or easily payable? Will there not be some cases in which he should absolve? In short, the judge appointed to this action ought to keep his eye also on the equity of the matter.

5 PAUL, *Edict, book 28:* If an heir is directed by a testator to give something at a fixed place, the discretionary action lies;

6 POMPONIUS, *Sabinus, book 22:* or if money is given by way of loan for consumption on condition of being returned at a fixed place.

7 PAUL, *Edict, book 28:* When there is a trial which rests on good faith, a contractual term for performance at a fixed place will give rise to, say, the action on sale or purchase or on deposit, not to the discretionary action. 1. But if someone stipulates for a delivery to him-

self at a fixed place, then this is the action to use.

8 AFRICANUS, *Questions, book 3:* Having stipulated for one hundred to be given at Capua, you accept a guarantor. The money must be claimed from him just in the same way as from the promisor himself. That is to say, if the money is claimed other than in Capua, the discretionary action must be brought, and the value at issue must be fixed by reference to his or the plaintiff's interest in having the sum paid at Capua rather than elsewhere. Further, if it happens that it is the principal debtor's fault that the whole hundred has not been paid at Capua, the guarantor's obligation should not on that account be increased. Nor should this situation be compared to the obligation to pay interest; for there then are two stipulations, while here there is just one in respect of money lent, the performance of which is to be valued by a judge according to a principle within his own discretion. I think this difference is very clearly demonstrated by the fact that if, after the debtor has fallen into delay, some part of the money is paid and then the rest is claimed, the duty of the judge should be to value the interest of the plaintiff in having paid to him at Capua no more than the sum now claimed by him.

9 ULPIAN, *Sabinus, book 47:* One who promises to give at a certain place cannot perform at any other than the promised place without the consent of the stipulator.

11 PAUL, *Questions, book 4:* After delay has prevented performance at Capua, the creditor, though anxious to maintain the discretionary action, nevertheless accepts security by means of a personal guarantee in respect of his claim. This raises the question whether it is not the case that the extra money which can be awarded by the judge now ceases to be due and is so far removed from the obligation that payment of the principal sum or acclaim lodged at Capua will exclude the judge's discretionary award. The other view would be that if the judge could have condemned for one hundred and twenty-five, one hundred paid from that total should be attributed both to principal and surcharge, leaving intact a claim for the balance of the principal and allowing the surcharge to attach proportionately to that amount. But I think that that cannot be done, especially since the creditor must be deemed actually to remit the penal surcharge by his acceptance of the money.

5

THE *CONSTITUTUM* OF MONEY

1 ULPIAN, *Edict, book 27:* With this edict, the praetor promotes natural equity in that he protects a *constitutum* made by agreement on the ground that it is a serious matter to go back on one's word. 1. The praetor's words are: "Whoever makes a *constitutum* of money owed." "Whoever" is taken as including both men and women, since women too are liable on a *constitutum* made other than by way of a guarantee. 2. Though nothing is said in the edict about a *pupillus*, he cannot in fact come under an obligation by *constitutum* except with his tutor's authority. 3. If a son-in-power makes a *constitutum*, is he liable? I think the right answer is that the *constitutum* both makes him liable and his father too up to the limit of the *peculium*. 4. Since one who takes a void stipulation aims to get a stipulation, not a *constitutum*, it has to be held that he cannot maintain the action on a *constitutum*; for what is done is with intent to make a stipulatory promise, not a *constitutum*. 5. Can a *constitutum* be made of something other than what is owed? Since it is already held that one thing can be given for another, nothing prevents there being a *constitutum* of something different being made to replace a debt. So if someone who owes a hundred makes a *constitutum* of corn to the same value, I think that is a valid arrangement. 6. A *constitutum* can be made in respect of a debt arising from any cause, that is, from any contract of fixed or unfixed content, or a debt in respect of a price under a sale, or else on the basis of dowry or of tutelage or any other contract whatever. 7. Besides even a natural debt is enough. 8. Further, one who is bound by an action of the *jus honorarium* and not by *jus civile* is liable under a *constitutum*. For a debt under *jus honorarium* is nonetheless understood to be a debt. Thus, both a father and an owner when liable in respect of a *peculium* will be bound if they make a *constitutum*, their liability being measured by the amount in the *peculium* at the time the *constitutum* is made. On the other hand, if he adds an extra sum in his own name, he will not be liable in respect of that surplus.

2 JULIAN, *Digest, book 11:* But if he gives a *constitutum* on his son's account for payment of ten, even though only five are in the *peculium*, he will be liable for the ten embraced by the *constitutum*.

3 ULPIAN, *Edict, book 27:* But if a husband makes a *constitutum* in respect of the dowry beyond his means, he will be liable for the full amount, because he has made the arrangement in respect of something that was owed. However, to the wife he can be condemned only within his means. 1. Suppose someone makes a *constitutum* in respect of a debt which is owed by *jus civile*, but not by praetorian law by reason, that is, of a defense. Is he bound by his *constitutum*? The right answer is, as Pomponius also writes, that he is not, because taking both laws together the money for which the *constitutum* was given is not owed. 2. Suppose one who owes both by *jus civile* and praetorian law makes a *constitutum* while his obligation is suspended against a future day. Is he bound by the *constitutum*? Labeo says he is, and Pedius approves that opinion. And Labeo adds that it was even and indeed especially on account of these sums of money not yet claimable that the *constitutum* was introduced. I am not reluctant to approve that opinion; for it has the advantage that a man is bound if, being under an obligation as from a certain day, he undertakes a *constitutum* to pay on the same day.

4 PAUL, *Edict, book 29:* But he is likewise bound if his *constitutum* fixes a nearer day for payment.

5 ULPIAN, *Edict, book 27:* It is agreed that if one who has promised to perform at Ephesus then makes a *constitutum* to perform elsewhere, he is bound. 1. Julian holds that one who makes a *constitutum* in Rome for a legacy obtained in a province ought to be able to be sued, which is correct. However, if he made the *constitutum* to pay in Rome, when he himself was not in Rome but still in the province, the action on *constitutum* ought not to be granted against him. 2. The requirement that the subject matter of a *constitutum* must be owed relates only to that subject matter and certainly does not extend to require the person to whom it is made to be a creditor. In fact, you can incur liability by making a *constitutum* for what I owe, and a debt due to you will become due to me if a *constitutum* is made to me for it. 3. Julian writes in the eleventh book: Titius sent me a letter in these terms: "I have written that in accordance with a mandate from Seius, I shall without dispute give you security for and shall pay any debt shown to be due to you." Titius is liable to the action on a money *constitutum*. 4. However, if one person makes a *constitutum* to the effect that another will pay rather than he for another, he incurs no liability. Pomponius so writes in the eighth book. 5. Again, if you make a *constitutum* that you will pay me, you are liable, but if the *constitutum* to me is that you will pay Sempronius, there is no liability. 6. Julian, in the eleventh book of his *Digest*, writes that you can make a *constitutum* to a procurator. Pomponius understands that to mean that you bind yourself to pay the procurator himself, not the principal. 7. Again, a *constitutum* can be made to the tutor of a *pupillus*, to a municipal agent, and to a lunatic's curator. 8. Likewise, they themselves are liable if they make a *constitutum*. 9. If a *constitutum* is made to a municipal agent, tutor of a *pupillus* or curator of a lunatic or *minor* to the effect that payment shall be made to the *municipes*, *pupillus*, lunatic, or *minor*, I think that considerations of expediency require that an *actio utilis* should be given to the *municipes*, *pupillus*, lunatic, or *minor*. 10. There is no dispute that a *constitutum* can be made to a slave and that whether it is for payment to the master or to himself, the slave acquires the obligation of either kind for the master.

6 PAUL, *Views, book 2:* The same applies where a *constitutum* is made to one who is in my service in good faith.

7 ULPIAN, *Edict, book 27:* Further, a *constitutum* made to a son-in-power is also valid. 1. If I take a stipulation for payment to me or Titius, it is impossible to make a *constitutum* to Titius in his own name. So Julian holds. The reason is that he has no right to sue even though payment can be made to him.

8 PAUL, *Edict, book 29:* However, if you make a *constitutum* to pay me or Titius, the

action does lie for me. But if you make a *constitutum* to pay me alone and then you pay Titius you will still be liable to me.

9 PAPINIAN, *Questions, book 8:* But Titius will be liable in the *condictio* for money not owed to make restitution to the payer of the payment wrongly made to him.

10 PAUL, *Edict, book 29:* The same applies where there are two stipulators and, after a *constitutum* to one, payment is made to the other, because the one to whom the *constitutum* was made ought to be put in the position of the one already paid.

11 ULPIAN, *Edict, book 29:* Provided that the subject matter of the *constitutum* is owed, the *constitutum* will be valid even though there is nobody whose liability is intact; suppose, for instance, that someone makes a *constitutum* to pay in respect of a debtor whose estate has not yet been accepted or who has been captured by the enemy. For Pomponius also writes that the *constitutum* is valid because made in respect of money actually owed. 1. If someone owes one hundred aurei and makes a *constitutum* for two hundred, he is liable only for one hundred, because that is the money which is owed. Thus, one who makes a *constitutum* for principal and unowed interest is liable only in respect of the principal.

12 PAUL, *Edict, book 13:* Again, if ten are owed and ten plus Stichus are made the subject of the *constitutum*, it can be said that the liability is confined to the ten.

13 PAUL, *Edict, book 29:* But one who, owing twenty, makes a *constitutum* to pay ten does incur liability.

14 ULPIAN, *Edict, book 27:* However, one who makes a *constitutum* to pay is liable whether he names a fixed amount or not. 1. If one makes a *constitutum* to give a pledge, that *constitutum* too should be upheld, since the efficacy of pledges is involved. Also, as Pomponius writes, even if one makes a *constitutum* that a given person will act as one's guarantor, one will still be liable. What if that person will not give the guarantee? I think the person making the *constitutum* is liable unless the contrary was intended. What if he dies before doing so? If delay is involved, it is fair that the person making the *constitutum* should be liable for the other's damages or to find another equally sound guarantor. If there is no delay, I prefer the view that he is not liable. 3. We can make a *constitutum* whether we are present or not, just like a pact, and also either using a messenger or in person; also any words will do.

15 PAUL, *Edict, book 29:* Even if my *constitutum* to you is made through a free person there will be no impediment, since we acquire through free people. For in this case, it appears that he provides only a ministerial service.

16 ULPIAN, *Edict, book 27:* If two of us make a *constitutum* as two principals, the action can be brought for the full amount against either one. 1. A *constitutum* can be confined to a fixed place or time, and it is not the case that action must be brought at the place specified; rather, on the model of the discretionary action, it can be brought anywhere. 2. The praetor says: "If it appears that one who has made a *constitutum* neither is paying nor has performed and that the plaintiff is not responsible for nonperformance of the *constitutum*." 3. This implies that the action lies provided the plaintiff is not responsible even if it is acts of god which intervene. However, it ought rather to be said that the defendant should be relieved. 4. But these words of the praetor "the defendant has not performed the *constitutum*," can give rise to doubt as to whether they refer to the time in the *constitutum* or are to be extended to joinder of issue. I think the time in the *constitutum*.

17 PAUL, *Edict, book 29:* However, if he tenders on another day and the plaintiff will not accept and there is no lawfully sufficient reason for refusing, it is fair to relieve the defendant either by a defense or by legitimate construction to ensure that the plaintiff's conduct adversely affects himself right up to judgment with the effect that these

words "and has not performed" mean that he has not done so either on the day fixed by the *constitutum* or subsequently.

18 ULPIAN, *Edict, book 27:* Again, when the praetor says, "the plaintiff is not responsible for," those words admit of the same kind of doubt. Pomponius, for instance, is not sure whether they apply when there is something to make him responsible, not indeed in the period up to the day fixed in the *constitutum*, but earlier or later. And I think these words too must refer to the time fixed by the *constitutum*. In this connection, Pomponius writes that the plaintiff must bear the consequences of being prevented from appearing even by reasons of health, violence, or weather. 1. When he goes on, "and at the time of the *constitutum* the money in question was owed," those words require a broader construction. The first effect of the phrase is that if the money was owed at the time of the *constitutum* but has now ceased to be, the *constitutum* is nevertheless binding, since the action looks to the past. Thus Celsus and Julian write that where one who is liable under an action limited by time enters into a *constitutum*, he should still be bound even if the action's period of limitation expires after the *constitutum* has been made. Hence, Julian's view is that if the *constitutum* promises payment after the period annexed to the obligation he is still bound, because the undertaking was given at a time when there was an obligation, albeit it looked forward to a time when there would not be. 2. It is not irrelevant to ask here whether this action is penal or reipersecutory. The better view, and one that also commends itself to Marcellus, is that it is reipersecutory. 3. There was an early doubt whether the bringing of this action consumed the principal obligation. And it is safer to say that discharge occurs by payment under this action rather than by joinder of issue in it, because payment is referable to both obligations.

19 PAUL, *Edict, book 29:* When something is owed conditionally, a *constitutum* in respect of it, whether absolute or for a fixed day, is suspended against the same condition. Thus, when the condition is fulfilled, the *constitutum* becomes binding, and if it fails, both actions die with it. 1. However, if someone owes absolutely and makes a conditional *constitutum*, Pomponius says that an *actio utilis* lies against him. 2. If a father or master makes a *constitutum* to pay the amount of the *peculium*, the *peculium* should not be reduced by virtue precisely of his becoming bound in that regard; and even if the *peculium* is lost, he will not be discharged.

20 PAUL, *Plautius, book 4:* For matters going to increase and reduce the *peculium* do not touch the action on *constitutum*.

21 PAUL, *Edict, book 29:* One who had promised Stichus fell into delay and then, Stichus being dead, made a *constitutum* to pay his value. He is bound. 1. If you make a *constitutum* without appointing a time for payment, there is a way of arguing that you are not liable, even though the words of the edict are quite sweeping. Otherwise, if you do not pay at once as you have undertaken, you will be able to be sued immediately. However, a short space of time, not less than ten days, must be imposed for the right to demand payment to become perfect. 2. One who makes a *constitutum* to pay does not satisfy that *constitutum* by offering alternative satisfaction; but if he makes a *constitutum* to give security and gives a guarantor or pledges, he will not be liable, since it is immaterial what form of satisfaction he gives.

22 PAUL, *Short Points, book 6:* If after a *constitutum* made to you for money you restore the inheritance in question to another under the *senatus consultum Trebellianum*, the fact that you have transferred the principal claim to another means that the action on the money *constitutum* must also be denied to you. The same is true of the possessor of an estate after he has been displaced. However, the better view is that the action must be given to the *fideicommissarius* or to a successful challenger.

23 JULIAN, *Digest, book 11:* Suppose that one who promised to give a slave is himself

responsible for failing to deliver, and the slave is now dead. Even if a *constitutum* made by him was for giving the slave, he will be liable to the action on a money *constitutum*, which will make him pay the slave's price.

24 MARCELLUS, *Replies, sole book:* Titius sent Seius a letter in these terms: "There remained in my hands fifty from the advance you made under the contract of my *pupilli*. I shall be bound to give you these fifty in good coin on the Ides of May. If I do not give them on that day above written, I shall then be bound to pay interest at such and such a rate." Question: Does this *cautio* cause Lucius Titius to stand as principal debtor in the shoes of his *pupilli*? Marcellus's answer: Yes, if a stipulation intervened. Second question: If not, is he liable to the action on a money *constitutum*? Marcellus's answer: He is liable for the principal, for that interpretation is kinder and more expedient.

25 PAPINIAN, *Questions, book 8:* A man, owing two things in the alternative, made a *constitutum* to give one. Question: can he still give the one outside the *constitutum*? My opinion was that he should not be heard to say that he now wants to break faith in respect of the thing within the *constitutum*. 1. Suppose an oath is tendered to you, and you swear something is due to you. Though you have a proper action on that, you can correctly proceed by action on *constitutum*. If the oath is made in response not to my spontaneous tender, but rather on a referral back made by me under moral pressure—for everyone knows it is more decent to refer than to swear oneself—that makes no difference despite the fact that the pressure to refer arises from your own initiative and my sense of decency.

26 SCAEVOLA, *Replies, book 1:* A man wrote on these lines to a creditor: "Sir, you may look to me, interest apart, for the ten lent from your cashbox to Lucius Titius." My advice was that on the facts as given he had incurred liability to the action on a money *constitutum*.

27 ULPIAN, *Edict, book 14:* When someone makes a *constitutum*, it is immaterial whether the debtor is present or absent. Pomponius goes even further than this, holding in the thirty-fourth book that the *constitutum* can be made against the debtor's will. He has therefore to disapprove Labeo's opinion to the effect that a defense *in factum* ought to be given to one who, having made a *constitutum* for another, is then forbidden to pay by the principal debtor. And there is good sense in what Pomponius says, because it ought not to be possible for the maker of the *constitutum*, once bound, to be discharged by any act of the debtor.

28 GAIUS, *Provincial Edict, book 5:* When one person makes a *constitutum* to pay on behalf of another, the latter remains bound.

29 PAUL, *Edict, book 24:* If someone is liable to an action for insult, theft or robbery, a *constitutum* made in respect of that liability is binding on him.

30 PAUL, *Views, book 2:* If someone makes a *constitutum* to two people in the form "pay to you or Titius," payment to Titius technically still leaves him liable to the special action on the money *constitutum*, but he ought to be relieved by grant of a defense.

31 SCAEVOLA, *Digest, book 5:* Lucius Titius died in debt to the Seii. They induced Publius Maevius to believe the inheritance was his, and they had him set out in a letter to them that he, as heir to his uncle, acknowledged himself to be their debtor. In his letter, he also made mention that the money in question had come through into his own accounts. Question: Now that it has turned out that Publius Maevius got nothing of Lucius Titus's estate, does this document mean that he can be sued by the action on a money *constitutum*, and can he use the defense of fraud? Answer: No *jus civile* action arises on this ground but neither, on the facts as stated, does the action on a money *constitutum*. Supplementary question: Can he recover interest paid on the basis

described above? Answer: On the facts as stated he can.

6

LOAN FOR USE: THE ACTIONS FOR AND AGAINST THE LENDER

1 ULPIAN, *Edict, book 28:* The praetor says: "If someone is alleged to have lent something for use, I will grant a trial about it." 1. The interpretation of this edict is not difficult. The one thing to note is that the draftsman of the edict used the word *commodatum,* whereas Paconius used *utendum datum.* Between these two terms for loan for use Labeo says the only difference is as between genus and species, the former applying only to movable things, not to land, the latter to land as well. Yet it is evident that the word *commodatum* is also properly used of things pertaining to the realty. That is also the view of Cassius. Further, Vivianus says the word can even be used of habitation. 2. The action on loan for use does not go against an *impubes* in that loan for use can also not be contracted by a *pupillus* without his tutor's authority. This is taken as far as holding that even in the case of fraud or negligence committed after becoming adult, this action cannot go against him because it is inapplicable from the start.

2 PAUL, *Edict, book 29:* The action on loan for use is also not to be granted against lunatics. Against them the action for production will be given, so that the thing, once produced, can be vindicated.

3 ULPIAN, *Edict, book 28:* However, it seems to me that if the *pupillus* is enriched, an *actio utilis* on loan for use ought to be granted under the rescript of the deified Emperor Pius. 1. If the thing lent is indeed returned but returned in worse condition, it is understood not to have been returned at all, unless the lender's interest is made good. In fact, it is quite right to say that something has not been returned when it has been given back in a condition altered for the worse. 2. In this action, as similarly in the others with trials resting on good faith, the oath as to value may be sworn; and, for valuation, regard is to be had to the time of judgment, not of joinder of issue as in actions with trials by the letter of the law. 3. The heir of a borrower for use is liable in the measure of his share of the estate, unless it happens that he has power to restore the whole thing and does not do so in which case in line with the discretion of a fair-minded judge, his condemnation will be for the full value. 4. Where something is lent for use to a son-in-power or a slave, only the action on *peculium* is to be brought, though one will indeed be able to use the direct action against the son-in-power himself. But if the lending is to a slave-girl or daughter-in-power only the action on *peculium* is maintainable. 5. The father or owner is here condemned not only where there is fraud on the part of these people but also for fraud of their own, which comes into consideration in this connection. Julian, in his eleventh book, explains this distinction in relation to the action on *pignus.* 6. Things consumed by use cannot be the subject of loan for use unless they happen to be given to someone for ceremony or display.

4 GAIUS, *Verbal Obligations, book 1:* Even money is often lent for use, just for the purpose of being counted out to comply with legal form.

5 ULPIAN, *Edict, book 28:* Where there is an agreement that the thing lent for use is to be given back at a fixed time or place, it is part of the judge's duty to take account of the place or time. 1. If one who maintains this claim is offered the value of the matter in issue and accepts, the property in the thing thereby passes to the offeror. 2. Now it must be asked what makes for liability in the action on loan for use, whether it is willful conduct, or fault as well, or even strict responsibility for every risk. It is

indeed the case in contracts that we sometimes have to answer for willful harm, sometimes also for fault. It is willful harm in deposit, and quite rightly so, because the deposit does not advance any interest of the depositee. The exception is where a reward is paid (for there it has been held by *constitutio* that fault must also be made good) or where the original agreement makes the depositee answer for both fault and risk of disaster. On the other hand, where, as in sale, hire, dowry, *pignus*, and partnership, the interest of each party is advanced, liability is for both willful conduct and for fault. 3. Loan for use generally advances the interest only of the borrower. Hence, the better view is that of Quintus Mucius, who thinks liability is for both fault and carefulness, and that in a case in which the thing is given subject to a valuation, the person undertaking liability for the valuation must bear the risk of any disaster. 4. However, where something occurs by reason of old age or disease or where something is forcibly carried off by robbers or some other such event happens, it is to be held that the borrower need not answer for matters of this kind, except when there is fault on his part. Hence, in case of disaster by fire or collapse of buildings or loss of some kind by act of God, he will not be liable, unless it happens that, having a chance to make safe the things borrowed, he prefers to save his own. 5. He must clearly also answer for the careful safe-keeping of the borrowed thing. 6. But among the earlier jurists, it was a question whether there was liability for the safe-keeping of a borrowed slave. In fact, there are times when the safe-keeping even of a slave must be answered for, as where he is lent in chains or is of an age to demand safe-keeping. Certainly, if the intention was that the one who sought to borrow should answer for safe-keeping, then it should be held that he must answer. 7. Furthermore, there are occasions when loss arising from death falls on the borrower. So if I lend you a horse for you to take it to a farm, and you take it into war, you will be liable in the action on loan for use. The same of a slave. Clearly, if I lend it for you to take to war, the risk will be mine. In fact, if I lend you a slave who is a builder and he falls from the scaffolding, Namusa holds the risk to be mine. But I think that is right only if I lent him to work on scaffolding. But if the loan was for him to work on the ground and you sent him up scaffolding, or else if the disaster happened because the scaffolding was defective having been lashed together, not by him, with too little care or with old ropes or poles, then I maintain that the risk which materializes from the fault of the borrower must be made good by him. In fact, it is also held in Mela's writings that if a borrowed slave stonemason dies in a collapse of scaffolding, the builder is liable in the action on loan for use for too negligently putting together the scaffolding. 8. It is indeed also the case that one who puts something lent for a use to a different use is liable not only on the loan but also for theft. So wrote Julian in the eleventh book of his *Digest*. His case is this: I lend you a ledger and in it you have your debtor enter a cheirograph, which I destroy; if I lent it to you for the promise to you to be entered in it, I am liable to you in the action against a lender for use; if not and you did not tell me the cheirograph was written there, you are, he says, liable to me on the loan; and he holds that you are definitely also liable for theft in that you put a thing lent to a different use, just in the same way, he says, as borrowers of horses or clothes are liable for theft if they use them for a purpose for which they were not lent. 9. The same measure of care demanded in relation to the thing borrowed has equally to be maintained in respect of whatever goes with that thing. For example, I lend you a mare who has a foal with her. The replies of the earlier jurists held that you were liable for the safe-keeping of the foal as well. 10. There are clearly cases in which the borrower will be liable only for willful harm, for example, when that is what is agreed, or where the loan is only in the interest of the lender, as by a man to his fiancée or wife to enable her to dress with greater dignity for her presentation to him or by a praetor putting on games to actors

or indeed by someone only too glad to lend to the praetor. 11. Now we must ask on what kinds of facts the action on loan for use will lie. Among the earlier jurists there were doubts about the following situation. 12. I give you a thing for you to give as a *pignus* to your creditor. You give it but then you do not redeem it so that you can return it to me. Labeo holds the action on loan for use lies. And I think that is right unless a charge was made in which case the action will have to be brought on the special case or on hire. If I pledge something on your behalf because you want me to, there will clearly be an action of mandate. Labeo also rightly says that if there is no fault in me in relation to the redemption, but the creditor will not give the *pignus* up, you have the action on loan for use just to make me assign my action against him. I am understood to be innocent of fault when I have paid the money already or have been ready to do so. It is clearly fair that the borrower should accept the costs of suit and such like. 13. If you ask me for a loan of a slave with a dish and the slave loses the dish, Cartilius says you have to bear the risk; for the dish is also within the loan for use, so that liability for fault attaches in respect of it too. Clearly, if the slave runs away with the dish, the borrower is not liable, unless he accepted liability for escape. 14. Suppose you beg me to provide the place-settings for your dinner party and to give the silver to your servant, and then you ask the same again on the next day with the result that when I cannot conveniently take the silver back home, I leave it with you and it is lost. What action can be brought and who bears the risk? On the risk, Labeo writes that the critical question is whether or not I set a guard. If I did, the risk is mine; if not, his with whom the things were left. My view is that the action to be brought is that on loan for use, but that the person with whom the things were left must answer for safe-keeping, unless it was expressly agreed otherwise. 15. If a vehicle is lent or hired to two people together, Celsus the Younger, in the sixth book of his *Digest*, writes that it is a question whether each is liable for the whole or for a share. And he says that it is impossible for two people each to own or possess the entirety of something, also that a man cannot be owner of a part of a unit but can be part-owner of the whole unit in an undivided share. On the other hand, the use of a bath, a colonnade, or a square is entire to each several person (for the use by others does not mean I use it less); nevertheless, in the case of a hired or borrowed vehicle I have in effect a share of its use, because I cannot be everywhere the vehicle goes. Yet the more correct view is, he says, that I must be liable for the whole amount in respect of willful conduct, fault, care, and safe-keeping. Hence, the two will in a sense both be considered principals, and if one performs the agreement, he will discharge the other. Also the action on theft will lie at the instance of either one

6 POMPONIUS, *Sabinus, book 5:* with the effect that action by one against the thief will extinguish the other's right to sue.

7 ULPIAN, *Edict, book 28:* It therefore becomes a question whether if one brings an action on theft, he alone should be liable to the action on the loan. On this Celsus holds that if the one who has not been plaintiff in theft is sued and if he is prepared at his own risk for the other, who has derived profit from the borrowed thing by suing for theft, to be made defendant, then he ought to be heard and absolved. 1. However, if the lender has an action on the *lex Aquilia* against his borrower's partner, it is a question whether he ought to assign it, as, for instance, where the other caused the loss which this one must, as defendant to his action on loan for use, make good. If indeed it is against this one that the lender has the Aquilian action, the fairest course is for him to release that claim when suing on the loan for use. Yet it will perhaps be said that the amount he can recover by the Aquilian will anyhow be reduced by what he gets in his action on the loan. And that is good sense.

8 POMPONIUS, *Sabinus, book 5:* When we lend something for use, we keep both ownership and possession of it.

9 ULPIAN, *Edict, book 2:* For no lender for use passes the property in the thing to the borrower.

10 ULPIAN, *Sabinus, book 29:* It is correct that a borrower who puts a thing to the use for which he borrowed it incurs no liability for deterioration which is not even partly his fault. For the case in which he is liable is where the deterioration is his fault. 1. Suppose I give something to an expert. Is his case the same as that of a borrower for use? If, indeed, I give in my own interest, as because I want to discover the thing's value, he will only be liable for willful conduct. If in his interest, for safe-keeping, whence the action for theft will be his. But suppose it is lost while being brought back to me? If the carrier was appointed by my mandate, I must bear the risk, but if he entrusted it to a person of his choice, he must still answer for fault if he had the thing in his own interest

11 PAUL, *Sabinus, book 5:* in that he did not select a suitable slave for the thing to be properly carried back.

12 ULPIAN, *Sabinus, book 29:* But if he had the thing in my interest, he is answerable only for intentional harm. 1. A messenger sent to claim back the thing lent was given it and absconded. If the owner directed that it be given to him, the owner bears the loss. But if he sent him only to remind the borrower to give the thing back, the loss is the borrower's.

13 POMPONIUS, *Sabinus, book 11:* If a borrower is condemned because of the disappearance of the thing, the owner ought to enter into an undertaking to give it to him if it is found. 1. Profit earned from things received to be tried out, as, for instance, working animals which are then hired out, must be accounted for to the person giving for trial. For nobody should be able to treat something as an investment until he also bears the risk of loss in relation to it. 2. If, as to a slave, I lend a thing to a freeman serving me in good faith, can I have the action on loan for use? In fact, Celsus the Younger held that if I directed him to do anything, I would have either the action on mandate or *praescriptis verbis*. The same therefore must be said of loan for use. It is no obstacle that in dealing with one serving in good faith our intention is not to hold him to an obligation. For it often enough happens that an implied obligation arises beyond what was intended, as for instance, where something not owed is mistakenly given to obtain a discharge.

14 ULPIAN, *Sabinus, book 48:* If my slave lends you my property for use and you know I do not want it lent to you, this gives rise to both the action on loan for use and on theft, and, besides these, also the *condictio* which goes on the basis of theft.

15 PAUL, *Edict, book 29:* It is possible to lend for use property which belongs to another but which is in our possession, even where we know it is another person's property we possess.

16 MARCELLUS, *Digest, book 5:* This is carried to the extent of enabling even a thief or robber who lends to have the action on loan for use.

17 PAUL, *Edict, book 29:* In loan for use a pact excluding liability for willful harm is of no effect. 1. The counteraction on loan for use [against the lender] can be instigated even when the main action [against the borrower] is not. This is the same as for other actions called counteractions. 2. If the action on loan for use is based on conduct of an heir, he is liable for condemnation in full even though heir only as to a share. 3. As lending rests on free will and decency, not on compulsion, so it is the right of the person who does the kindness to fix the terms and duration of the loan. However, once he has done it, that is to say, after he has made the loan for use, then not only decency but

also obligation undertaken between lender and borrower prevent his fixing time limits, claiming the thing back or walking off with it in disregard of agreed times. For there is a transactional relationship between them, and for that reason actions have been made available each way. It thus appears that what begins as a favor and merely as a matter of good will becomes a matter of mutual liabilities and legal actions. There is a parallel in the case of one who begins the unauthorized management of the affairs of someone who is away. For he cannot just leave it to go to the dogs without any sanction, since someone else might have taken on the job if he had not begun it. Again, one is quite free to choose whether to take on a mandate, but then there is an obligation to complete it. Thus, if you have lent me writing tablets for my debtor to enter a *cautio*, you will do wrong suddenly to demand them back. For if you had refused, I would have either bought some or made sure I had witnesses present. The same applies where you have lent timber to prop up a building and then hauled it away again or even knowingly supplied defective materials. Favors should help, not lead to trouble. In these cases, it is to be held that the counteraction offers the remedy. 4. Where two things are lent for use, Vivianus writes that it is possible to bring the action on loan for use in respect of one of them. However, Pomponius holds that that can only be accepted where the things are separate; for one who lends, say, a coach or litter cannot bring separate actions for constituent parts. 5. I borrowed a thing and lost it and paid its value instead. Then it came into your hands. Labeo holds that the counteraction will make you liable either to give me the thing or to give back what I gave you.

18 GAIUS, *Provincial Edict, book 9:* The standard of care to be adhered to in relation to things lent for use is that which any very careful head of a family keeps to in relation to his own affairs to the extent that the borrower is only not liable for those events which cannot be prevented, such as deaths of slaves occurring without fault on his part, attacks of robbers and enemies, surprises by pirates, shipwreck, fire, and escape of slaves not usually confined. What is said about robbers, pirates, and shipwreck is to be understood as applying only to the case in which something is actually lent to someone to take to distant parts. It is different where I lend silver to someone because he says he is giving a dinner party for his friends, and he then takes it off on a journey. For in that case without a shadow of doubt, he must answer for disaster due even to pirates, robbers, or shipwreck. These conclusions apply when the loan is made only in the borrower's interest. But if it is made in the interest of both parties, as where you take the responsibility for arranging a dinner to which we have invited a friend of both of us and I lend you the silver, I find it in some of the books that you will be liable only as for willful harm. However, it ought to be asked whether you will not also be liable for fault, just as in relation to things given by way of *pignus* or dowry, fault is brought into account. 1. Be that as it may, when a thing pledged, lent for use or deposited suffers deterioration at the hands of the recipient not only the actions immediately under discussion lie but also that under the *lex Aquilia*. But the bringing of one of them extinguishes the others. 2. There are sometimes good reasons for suing the lender for use, as where there has been expenditure on the health of a slave or, after an escape, on discovering and recovering him. Of course, the cost of food falls, as common sense tells, on the borrower for use. But even what we have said about expenses on health and escape ought to apply only to largish items. Lesser sums according to the better view must be met along with the cost of feeding by the borrower. 3. Again, someone who knowingly lends defective containers must, if wine or oil poured in is spoiled or spilled, be condemned on that account. 4. Whatever someone can win in the counteraction he can also obtain by set-off in a direct action brought against him. But it can happen that there is more to be obtained on the borrower's claim, or the judge may fail to take account of the set-off, or else no action may be

brought against him for recovery of the thing either because it has been destroyed accidentally or returned without recourse to litigation. We will say then that the counteraction is necessary.

19 JULIAN, *Digest, book 1:* It is out of the question that those who contract for looking after something or borrow something for use should bear loss wrongfully inflicted by a third party. For what degree of care and attention will secure us against commission of wrongful loss by other people?

20 JULIAN, *Urseius Ferox, book 3:* I give borrowed silver to my slave to be carried to you, he being of such character that nobody should have guessed he would be led astray by crooks. The loss is yours if crooks do get their hands on it.

21 AFRICANUS, *Questions, book 8:* You lent me something for use. Then you carried it off. Later you sued me on the loan. I did not know that it was you who had taken it. The judge condemned me, and I paid. What action do I have against you? The answer: In fact, not the action on theft, but I will have a remedy in the counteraction on loan for use. 1. On military service, I lent some containers to my comrades, sharing the risk. Then, my slave takes them and escapes to the enemy, being later retaken without them. It is held that I can have the action on the loan against my comrades, each for his share. But they can bring theft against me on the slave's account in that first, delictual liability attaches to the person and second, if I lend wholly at your risk and my slave walks off with the thing, you can sue me for theft on the slave's account.

22 PAUL, *Edict, book 22:* If a slave whom I have lent to you for use commits a theft, can you bring the counteraction on the loan (as in the case of medical expenses on the slave) or the action on theft? It is beyond question that the borrower has the normal action on theft. On the other hand, the lender is only liable to the counteraction on loan for use in the case in which he lent, knowing the character of the slave, to a borrower who did not.

23 POMPONIUS, *Quintus Mucius, book 21:* I lend you a horse for you to journey to a given place. If the horse suffers some deterioration on the journey itself without there being any fault on your part, you are not liable for loan for use. In fact, I shall be found at fault for lending a horse for a journey of that distance which was not strong enough to cope with the task.

7

PIGNUS: THE ACTIONS FOR AND AGAINST THE PLEDGEE

1 ULPIAN, *Sabinus, book 40:* The contract of *pignus* is made not only by delivery but also by mere agreement even in the absence of any delivery. 1. If, therefore, agreement alone suffices for the formation of *pignus*, it becomes a question, if someone points out gold as about to be pledged and then hands over bronze, whether the gold is charged as a *pignus*. And the effect is that the gold is charged, but the bronze is not, since that was foreign to the parties' agreement. 2. If, however, someone gives bronze as a *pignus* and asserts that it is gold, it is a question whether the bronze is charged as a *pignus*; and it surely must be, because there is agreement on the object. That is the better view. But the pledgor will be liable in the counteraction on *pignus* on top of the criminal fraud which he commits.

2 POMPONIUS, *Sabinus, book 6:* Suppose a debtor sells and delivers something which has been pledged and you lend him money with which he pays off the creditor with

whom he had pledged the thing. Then, you and he agree that the very thing already sold by him shall be your *pignus*. It is established that you achieve nothing, since you have been given as a *pignus* property which belongs to another. By this line of reasoning the *pignus* also becomes discharged in the hands of the buyer, and it is immaterial that the discharge is effected with your money.

3 POMPONIUS, *Sabinus, book 18:* Suppose you hand a *pignus* back to a debtor expecting to be given the money at once, but he throws it out of the window to be taken off by someone he has purposely put up to the job. Labeo says you can bring the action on theft against the debtor and also the action for production. And if the debtor opposes your counteraction on *pignus* with a defense to the effect that the pledge had been given back, you will say under the replication of malice and fraud that the thing was not so much given back as carried off by trickery.

4 ULPIAN, *Sabinus, book 41:* If there is an agreement for the *pignus* to be sold, made either initially or later, not only is a sale valid but also the buyer becomes owner of the thing. However, even if there is no agreement for the pledge to be sold, the rule we apply is that sale is still allowed, unless, indeed, there is an agreement that it shall not be allowed. Indeed, when there is an agreement forbidding sale, the creditor, if he sells, is liable for theft, except where the debtor has been given three warnings to pay and has failed to respond.

5 POMPONIUS, *Sabinus, book 19:* The same rule applies whether there is an absolute pact against sale or an infringement only of an agreement as to amount, condition, or place.

6 POMPONIUS, *Sabinus, book 35:* Even though there is an agreement that you may sell an estate which has been charged, that does not make it any more possible to compel you to sell, even if the pledgor is insolvent. For the term is inserted in your own interest. Yet Atilicinus says that on special facts the creditor can be compelled to a sale. For what if the debt is much less (than the value of the pledge), and the pledge can now be sold for more than later on? It is better to say that the pledgor can sell and use the money he gets to pay off the debt to the extent that the creditor should be compelled to display the thing if it is movable, subject to the debtor's first giving good security for indemnifying him. For making the creditor sell against his will is already harsh enough. 1. If the creditor sells the pledged estate for more than the debt and earns interest on the excess, he must account to the pledgor for the interest. Even if only he uses the money for himself he must account for interest. However, if he holds it as a deposit, no interest is owed.

7 PAUL, *Opinions, book 2:* Yet if he is too dilatory in repaying the excess deposited with him, the creditor must be compelled to pay interest on this account for the period of delay.

8 POMPONIUS, *Sabinus, book 35:* If I incur necessary expenses on a slave or estate given to me as a *pignus*, I will have not only a right of retention but also the counteraction on *pignus*. Suppose, for instance, that I no longer have the thing I might have retained, as where I spend money on doctors when the slave is ill and then he dies, or I prop up or repair the building and then it burns down. 1. A number of slaves are given as *pignus*, and the creditor sells some at given prices with a term making him answerable in case of eviction. Having thus recouped his debt, he can still hang on to the other slaves until an undertaking is entered with him indemnifying him against liability under his promise against eviction. 2. If one of a number of the debtor's heirs pays his share, the whole thing given as a *pignus* can still be sold, just in the same way as if the debtor himself had paid part of the debt. 3. I take a stipulation for thirty in three installments payable on days one, two, and three years hence, and I am

given a *pignus* subject to a pact that I shall have power to sell if the money is not paid, each part on its proper day. The rule here is that my power of sale does not accrue until the days for all the installments have passed, because those words contemplate the whole series of installments, and it remains untrue, until all the days have passed, that the money has not been paid, each part on its proper day. But once the installment times have all passed then the *pignus* can be sold even if only one part has not been paid. However, if the term were written thus, "if any of the money is not paid on its appointed day," the remedy under the pact would take immediate effect. 4. The pact giving a power of sale over a *pignus* should be framed *in rem* so as to reach everyone, but even if confined to a named creditor, his heir will also be able to sell unless that contradicts what was intended. 5. When the power to sell a *pignus* accrues, it can be exercised not only on account of the principal sum but also other matters, such as interest and expenses incurred on it.

9 ULPIAN, *Edict, book 28:* If a debtor gives me a *pignus* which belongs to a third party or contrives something malicious in relation to it, it is right to hold that the counteraction lies. 1. A *pignus* can be given for other reasons besides money, as where one gives someone a *pignus* against his acting as guarantor. 2. Strictly speaking, we use *pignus* for the pledge which is handed over to the creditor and *hypothec* for the case in which he does not get even possession. 3. The pledgor's action on *pignus* only arises when all the money is paid or satisfaction is given for it. By satisfaction we mean anything that suits the lender in the absence of actual payment. Then, the action on *pignus* will arise if he chooses to take the protection of new pledges in return for giving up this one or of guarantors or of a new debtor or some value given or of a mere agreement. It is right to say quite generally that whenever the creditor chooses to give up the pledge he is understood to have been satisfied, so long as whatever he wants is assured to him, even though he be let down in relation to it. 4. One who pledges something belonging to a stranger can also bring the action on *pignus* once he has paid the money. 5. Suppose one brings the action on *pignus* before paying. Though he is wrong to sue, yet if he tenders the money at the trial, he ought to get back the thing pledged and recover his damages.

10 GAIUS, *Provincial Edict, book 9:* However, willingness on the part of the debtor to offer some satisfaction other than payment, as where he is anxious to attach an extra promisor, is no use to him at all.

11 ULPIAN, *Edict, book 28:* There is not conceived to be any discharge where issue is joined with the debtor in the matter of the debt itself or where the guarantor is sued. 1. However, in a case where the obligation to pay the debt is novated, the *pignus* is extinguished, unless it is agreed that it can be recovered. 2. If, as one who is about to give you money, I take a *pignus* from you and then give you none, I will be liable to the action on *pignus* even before there is any performance on your part. The same is true if, in relation to the money for which the pledge was given, the debt is released or a condition fails or an effective pact is made that no suit shall be brought for the money. 3. The action on *pignus* lies after payment of whatever the pledge was given for whether principal only or interest. Interest may or may not be provided for in the stipulation, but if the pledge is charged for it as well, then the action will not arise so long as any interest is outstanding. It is a different matter where interest is promised above the permitted rate. In fact, that is wholly unlawful. 4. Suppose a creditor has a number of heirs and one of them is paid his share of the debt. The other heirs must not suffer from this but can sell the estate, giving back to the debtor what he paid to their co-heir. That opinion is soundly based. 5. It is correct to say that the money is paid not only where it is paid to the creditor himself to whom the thing is charged but also when it is paid with his consent either to someone whose heir he is or to his *procurator* or to a slave in charge of collecting debts. Hence, if you rent a house and sublet part of it to me and I pay my rent to your lessor, I will have the action on

pignus against you (for Julian writes that it is permissible to pay him). And if I pay part to you and part to him, the same will be said *pro tanto*. It is clear that my own furniture and movables will be charged only with the sum for which I took my lodging; for it is not to be believed that my odds and ends were agreed to be charged for the rent of the whole block. However, this agreement is impliedly taken to have been made with the owner of the building as well, so that it is not from the bargain of the tenant sublessor that the owner derives advantage, but from his own. 6. But it is not possible to acquire an obligation on *pignus* through free persons, not even through a *procurator* in most cases or through a tutor. Hence, they themselves will be sued by the action on *pignus*. That is indeed not changed by the fact that as has been held in a constitution of our emperor, we can acquire possession through a free person. The point of that here is that once a *pignus* is charged in our favor, we can get possession of it through a *procurator* or tutor even though the obligation itself cannot always be made for us by a free person. 7. But if my procurator or tutor pledges something, he will be the one to bring the action on *pignus*. This only applies to procurators whose mandate is for the giving of pledges

12 GAIUS, *Provincial Edict, book 9:* or those who are given the management of the entire property of people who do usually borrow money against pledges.

13 ULPIAN, *Edict, book 38:* Suppose that where a creditor is selling a *pignus* he agrees with the buyer that the debtor shall have a right to recover his thing by paying the buyer his price. Julian writes and the same has been held by rescript that the effect of this agreement is to give the actions on pledge against the creditor to compel him to assign his action on sale against the buyer. But the debtor himself can either vindicate the thing or maintain an action on the special case against the buyer. 1. As in the case of loan for use, both willful conduct and fault are taken into account in this action. So also liability for safe-keeping. Not, however, acts of god.

14 PAUL, *Edict, book 29:* Thus, the standards usually adhered to by a head of a family in relation to his own property are to be expected of the creditor.

15 ULPIAN, *Edict, book 28:* When a creditor gives back a *pignus*, he ought to give an undertaking to the debtor against fraud, and if land was pledged, there ought to be an undertaking about its rights, lest it happen that servitudes have been lost for nonuse by the creditor.

16 PAUL, *Edict, book 29:* Where without acting contrary to law a tutor pledges property of his *pupillus*, he ought to be protected, so long indeed as he borrowed the money in his ward's interest. The same is true for curators of the young and of lunatics. 1. It is certain that a counteraction on *pignus* lies to the pledgee. Accordingly, a pledgor will be liable if he gives property belonging to another or already pledged to another or charged to the state, though he also commits criminal fraud. But is he liable only if he knows or also where he does not? As far as the criminal charge is concerned, he has an excuse if he was unaware. However, Marcellus writes in the sixth book of his *Digest* that in the counteraction ignorance does not excuse. On the other hand, if the creditor knowingly accepts a pledge which belongs to another, is already charged, or is diseased, he will not have the counteraction. 2. Even land held at a rent can be pledged, as also an interest only in buildings since today those with such interests are given *actiones utiles*.

17 MARCIAN, *Action on Mortgage, sole book:* The deified Severus and Antoninus rightly held in a rescript that the charge will be attached without effecting any reduction in the rent for the site.

18 PAUL, *Edict, book 29:* Suppose that it is agreed that my debtor's bond shall be your *pignus*. That agreement is to be respected by the praetor in such a way that assistance should be given to you in claiming the money and to my debtor if I should go against him. Thus, if the bond promised money, you will apply its money proceeds to your own claim, and if it promised a thing of some kind, whatever you get you will hold

as a *pignus*. 1. If bare title is pledged, the usufruct accruing afterward will also be charged as *pignus*. It is the same with alluvial accretions. 2. When land is pledged and then sold, its accretions remain within the charge, because the land passes with all possible accretions. This is to be compared with the child of a slave-girl born after the sale. 3. If someone provides that a wood shall be a *pignus* for him, a ship made from the timber is not within the charge. So Cassius holds; for timber is one thing and a ship is another. Hence, he holds it necessary to add expressly when the pledge is given, "whatever things are the creation from or product of the wood." 4. A pledge given by a slave from his *peculium* is to be upheld if he has full license to manage his *peculium*. For he can even alienate such things.

19 MARCIAN, *Action on Mortgage, sole book:* The same rules may be taken to apply to sons-in-power.

20 PAUL, *Edict, book 29:* Property belonging to another can be given as a *pignus* with its owner's consent. Even if the pledge is made without his knowledge and he later ratifies, the *pignus* is valid. 1. If one thing is given to several creditors at one time the situation of all is the same. 2. If it is the creditor's fault that he cannot be paid, the action on pledge can rightly be brought. 3. On occasion, the action on *pignus* is not to be granted, as where the creditor buys his pledge off the debtor.

21 PAUL, *Short Points, book 6:* When a house is given as *pignus*, its site will be charged as well. For it is a part of it. And, likewise, a building will be subject to any rights created over the land.

22 ULPIAN, *Edict, book 30:* Papinian admits that when a creditor sues for theft after a *pignus* has been carried off, everything he gets thereby is attributed to the debt. And that is right, even when the theft happens through the creditor's own fault. This is all the more to be said of what he gets by bringing the *condictio*. But is what the debtor himself pays up in an action on theft or a *condictio* also attributable to the debt? It is indeed uniformly held and handed down that he ought not to be given back what he himself has been made to pay in an action for theft. And Papinian so holds in the ninth book of his *Questions*. 1. Papinian holds the same for the case where the creditor gives back to the debtor under duress a slave whom he took in good faith as a pledge: For, if he brings his action for duress and obtains the fourfold penalty, he will neither give any of it back nor attribute it to the debt. 2. If a usurper gives something as a *pignus*, he can have the action on *pignus* even in respect of fruits, although he has no power to make the fruits his own (for surviving fruits can be claimed from an usurper by a *vindicatio*, and those consumed by a *condictio*. The fact that the creditor is a possessor in good faith is thus allowed to work to the advantage of the usurper. 3. If after a *pignus* has been sold, the debtor, having borrowed or hired it, will not give up possession, he is liable to the counteraction. 4. If a creditor in selling the pledge promised the double penalty (in fact this actually happened and he was sued on account of eviction and was condemned), can he have recourse to the counteraction on *pignus*? And he can be accorded his remedy over, so long as he sold without fraud or fault and performed the business in the manner of a careful head of a family. On the other hand, if he took no trouble over the sale and just picked up what he could have got even without the warranty, he has no remedy.

23 TRYPHONINUS, *Disputations, book 8:* The creditor cannot get more from the debtor than the amount of the debt. But suppose there was a stipulation for interest and five years, say, after receiving the price of the property pledged he was defeated in litigation and paid over the double penalty. He can claim even the interest referable to the

intervening period because it has plainly come about that nothing has been irreversibly paid to him. However, if he paid the single penalty he must be defeated in his claim to interest by the defense of fraud, because he had the use of the money which he received from the buyer.

24 ULPIAN, *Edict, book 30:* This neat question was put to me. If a creditor successfully petitions Caesar for possession of a pledge and then is evicted from it, can he have the counteraction on *pignus*? The obligation arising from *pignus* is here understood to have been extinguished and the contract abandoned. Instead, an *actio utilis* is adapted to this case, as for that in which a thing is given him by way of substituted performance, enabling him to satisfy himself up to the amount of the debt or his damages. Also, the creditor can use a set-off against a claim made against him by action on *pignus* or some other cause. 1. Can someone who pays the creditor dud coins bring an action on *pignus* as having paid the money? It is agreed that he can neither use the action on *pignus* nor obtain his release, since dud money does not discharge a payer. The false coins, of course, must be given back. 2. If the creditor sells the pledge for more than the debt, but has not yet collected the money from the buyer, can the action on *pignus* be brought against him to recover the excess or ought the debtor to wait until the buyer pays, or begin an action against the buyer? My view is that the creditor is not to be pressed to pay, but that either the debtor must wait or if he will not, the claims against the buyer ought to be assigned to him, though at the seller's risk. On the other hand, once the creditor has received the money, he must return the excess. 3. It is something to be taken into account under the action on *pignus* if the creditor mistreats pledged property or weakens slaves. Clearly, if it is on account of their wrongdoings that he confines them, binds them, or hands them over to prefect or governor, the creditor must be held not to be liable in the action on *pignus*. If, therefore, he puts a slave-girl to prostitution or compels her to some other disreputable conduct, the *pignus* of her is discharged on the spot.

25 ULPIAN, *Edict, book 31:* If a creditor gives training in skills to slaves who have been pledged, he will have the counteraction provided they were already in course of acquiring those skills or the debtor consented. If these requirements are not satisfied, the counteraction will nevertheless lie if the skills in question are of a kind needed, but it will not lie simply to compel the debtor on pain of doing without his slaves to pay the amount spent by the creditor. For just as his fraud and fault liability prevent neglect, so it also stops the creditor so improving the thing pledged as to make it difficult for the debtor to redeem. Take the case in which you are given a *pignus* of a large tract of land by a pledgor who can hardly pay his way let alone do agricultural improvements, but, having taken the pledge, you do bring it under cultivation and make it very valuable. Besides, it is not fair that I should go looking for more lenders or be forced to sell what I want recovered or, from want of means, breach my duty to you. A balance, therefore, must be struck between these considerations by the judge in such a way as to give ear to neither a fussy debtor nor an oppressive creditor.

26 ULPIAN, *Disputations, book 3:* Since our emperor with his father very frequently held in rescripts that a *pignus* could be constituted by will, it is not surprising that it can also be constituted by the terms of a *missio in possessionem* which, for whatever reason, a magistrate grants against someone. 1. It must be understood that when a *pignus* is constituted by the order of a magistrate, it does not take effect unless there is an actual entry upon possession.

27 ULPIAN, *Opinions, book 6:* Suppose that when a creditor asks for his money the debtor, having none to hand, gives him some golden figures to pledge with another lender. If that creditor who took them has now got them back discharged by virtue of payment, he can be ordered to produce them. However, if even now they still remain with the creditor's creditor, they are understood to have been charged with their owner's assent, but he has his own action against his own creditor to secure their discharge and delivery.

28 JULIAN, *Digest, book 11:* Suppose a lender accepts a pledge and then loses possession of it. He brings the Servian action and thus recovers the value in issue. If the debtor afterward makes a claim for the same thing, he will be defeated by a plea in defense, except where the debtor tenders to him the sum paid on his account. 1. If a slave takes a pledge in respect of a debt due to his *peculium*, the action on *pignus* lies to the debtor against the master.

29 JULIAN, *Digest, book 44:* Suppose you buy something which belongs to a stranger, pledge it with me, and then ask to have it back as *precarium*. If its owner then makes me his heir, the *pignus* ends and only the *precarium* survives. Hence, your usucapion is interrupted.

30 PAUL, *Epitome of the Digest of Alfenus, book 5:* A man lent to a waterman. When the debt was not paid on the day, he on his own authority detained the boat on the river. Then, the river rose and swept the boat away. On this, the reply was that if he held the boat against the will of the waterman, the risk of its loss was on him; but if the debtor consented to giving it up to be detained, then the lender was only liable for fault, not for acts of god.

31 AFRICANUS, *Questions, book 8:* If a slave who has been given as a pledge commits theft against the lender, the debtor has the option of leaving him there by way of noxal surrender. But if he knowingly pledged me a thief, then even if he is willing to leave him with me as noxally surrendered, I shall nonetheless have my action on *pignus* to compel him to make good all my loss. The same rules are to be applied, says Julian, in the case of a slave who commits theft after having been deposited or lent to be used.

32 MARCIAN, *Rules, book 4:* The lender can maintain the counteraction on *pignus* against a debtor who pledges property of a stranger. And he can do so even if the debtor is solvent.

33 MARCIAN, *Action on Mortgage, sole book:* Once a debtor has paid the money, the action on *pignus* can be used to recover *antichresis* (interest in kind). For even in relation to *pignus* it is permissible to employ that term.

34 MARCELLUS, *Replies, sole book:* Titius lent money to Sempronius and against the loan took a pledge. When sale of the pledge was imminent because the money was not being paid, the debtor asked the lender to buy the estate at a given price. Having succeeded in his request, he sent a letter reciting that he had sold the estate to the lender. Question: Can the debtor set this sale aside on tender of the principal and interest which are due? Marcellus's reply was that on the story as set out no revocation was possible.

35 FLORENTINUS, *Institutes, book 8:* Suppose that both principal sums and interest are due from one who has money debts secured by pledges. Whatever he receives from the sale of the pledges must be applied to the discharge first of the interest agreed to be already due and then, if anything is left, to the principal, and no attention is to be paid to any election he makes, when he knows he cannot meet his obligations, as to which *pignus* he wishes to be discharged from which debt. 1. *Pignus* transfers only possession to the lender, while title remains in the debtor. The debtor, however, can have the use of his property either as *precarium* or on hire.

36 ULPIAN, *Edict, book 11:* What kind of liability is incurred by one who, in giving a *pignus* to a lender, substitutes bronze for gold? On this case, Sabinus quite correctly writes that if the bronze is substituted after the gold has been given, he is liable for theft; if in the act of giving, he acts wrongly but is not a thief. But I think that the

action on *pignus* also lies here, and Pomponius writes to similar effect. Moreover, frequent rescripts hold that he is punishable *extra ordinem* for criminal fraud. 1. Also, if someone willfully and with full knowledge pledges something belonging to a stranger or pledges to me something already pledged to another without telling me, he will be caught by the same criminal charge. Of course, if the thing is substantial and pledged for a modest sum, it ought to be said that both charge of criminal fraud and the actions on *pignus* and fraud should lapse, as on the ground that the second pledgee is then in no way endangered.

37 PAUL, *Plautius, book 5:* If I hire out to the owner a *pignus* given to me, I retain possession through the hire. For before he hired back the thing the debtor did not have possession, and then I have the intention of retaining possession, and as a hirer he has no intention of obtaining it.

38 MODESTINUS, *Distinctions, book 1:* Tutor's authority is essential when a *pupillus* takes a pledge. The reason is the danger of his facing an action on *pignus*.

39 MODESTINUS, *Replies, book 4:* Gaius Seius pledged his estate to Lucius Titius against money lent. Later a pact was made between them that in recompense for his money the lender should for a given time have possession of his pledge. However, before that term expired the lender, putting his affairs in order, provided by his will that one of his sons should have that estate and added, "which I have bought from Lucius Titius," though there had been no purchase. Among the signatories to that will was Gaius Seius, the debtor. Question: Does this seal of his do him any prejudice when no document of sale is produced but only a pact allowing the lender to take the fruits for a fixed term? Herennius Modestinus gave this reply: The fact that the debtor is said to have been a signatory to the will of his creditor who therein recited that he had bought the pledge is no obstacle to there being a contract of *pignus*.

40 PAPINIAN, *Replies, book 3:* A debtor, if he buys the pledge he has given from the lender, beats the air, since purchase of one's own property is a nullity. Even if he buys for a low sum and claims the pledge or vindicates his ownership, the lender will not be compelled to restore possession to him unless he tenders the whole amount of the debt. 1. A debtor's son still in paternal power achieves nothing by buying a pledge from his father's creditor with coins from his *peculium*. Hence, should the debtor's patron obtain possession despite the will, he will acquire a share of the ownership. But if the son raises a price out of his father's own property, then payment of that money discharges the *pignus*. 2. Once the money is paid, the creditor ought to restore possession of the pledge, if he has physical possession. But that is all he is obliged to do. So if in the meantime the creditor has pledged the pledge, the fact that the owner pays the money due from him will not result in a right being given to claim the second pledge or the extinction of the second pledgee's lien.

41 PAUL, *Questions, book 3:* You pledged property belonging to a stranger and then acquired title to it. An *actio utilis* on *pignus* is given to the lender. The same is not to be said when I become heir to Titius, who pledged my property without my consent. For in this version no claim to the pledge is to be conceded to the lender. It certainly is not enough to make the *actio utilis* on *pignus* available simply that the same person is both owner and owes the money. However, if there is an agreement in relation to the pledge to test the question whether it was made by deceit on his part, it will be wrong of him to resist the motion for an *actio utilis*.

42 PAPINIAN, *Replies, book 3:* In a trial concerned with a pledge which has been given, the lender is under compulsion of law to restore the balance of the price with interest, and he is not to be heard asking to substitute the buyer in his place, even though the sale, which is made on considerations of fact, is the lender's own business.

43 SCAEVOLA, *Digest, book 5:* A man charged an unencumbered site as *pignus* and delivered his document of purchase to the lender. When he wanted to develop the site a neighbor began a dispute about its extent. Having no other way to prove the point, he asked his lender to produce the document of warranty which he had handed on to him. He did not produce it with the result that the developer built within the reduced area and in that way suffered loss. Question: Ought the judge to take account of that loss under a defense of fraud made against a claim by the lender to the money or possession of the *pignus*? Answer: If the lender did not deliberately damage the debtor by keeping from him the use of the document, the debtor can bring the action on *pignus* when the money has been paid; but if he did seek to achieve that end, then the action can be brought against the lender even before the money is paid for damages in full. 1. Titius borrowed money from Gaius Seius against a pledge of containers. While Seius was keeping the containers in a warehouse, an officer, acting under the authority of the department of the corn supply, seized them for the harvest. Later they were recovered at the instance of Gaius Seius, the lender. Question: Should the debtor, Titius, or the creditor, Seius, bear the wear and tear of that operation? Answer: On the story as told there is no liability for the damage so arising.

BOOK FOURTEEN

1

THE ACTION AGAINST THE SHIPOWNER[1]

1 ULPIAN, *Edict, book 28:* Everyone acknowledges the practical value of this edict: Just as liability is imposed on the person who puts someone in to manage a shop or business, so it is only fair to impose liability on the person who appoints a ship's captain, since people who need to go by ship may not be aware of the standing or character of the man with whom they have to deal. Indeed, one's dealings with the captain of a ship may be more urgent than those with the manager of a business, since one can always check the standing of a business manager before dealing with him, whereas with a ship's captain there may not be information on the spot or enough time for full consideration. 1. By "ship's captain," we mean the person who is given charge of the whole ship. 2. Although the shipowner is liable for all the delicts of the sailors on board, he is not liable on contracts made with any member of the crew, contracts and delicts being different. A person permits his appointed captain to make contracts, but not the sailors he enlists, though he must see to it that the sailors behave carefully and honestly. 3. The captain is appointed to hire out the ship for the carriage of cargo, to take on passengers, or to purchase provisions or equipment; but even if he buys and sells cargoes, this will bind the shipowner if the captain was appointed for that purpose. 4. It is irrelevant what the status of a ship's captain may be, whether free or slave, or, if a slave, whether the shipowner's or someone else's; nor is his age relevant; for that is up to the person who appointed him. 5. "Ship's captain" includes not only a person appointed by the shipowner but also a person appointed by the captain himself. Julian said as much in a case where the shipowner was unaware of the subappointment. If the shipowner knows of the subappointment and allows the surrogate to join the captaincy, he is treated as having made the appointment himself. This seems to me to be the right view: I must stand by all the acts of the captain whom I myself have appointed; for otherwise those who deal with him would be let down. For practical reasons, this is accepted more readily in the case of a ship's captain than of a business manager. Suppose, however, that it was a term of the captain's appointment that he appoint no delegate. Should we follow Julian here? Or suppose that the prohibition was specific: "Do not make Titius captain." Even so one must hold that the interests of those using the ship must prevail. 6. "Ship" includes any sea or river vessel, lake craft, or even a raft. 7. It is not for everything that the praetor grants an action against the shipowner, but only "on account of those matters" for which the captain was appointed, that is, only if the captain was appointed to deal with that sort of thing—for example, if he charters the ship to carry cargo or buys gear to be used on

1. The word *exercitor*, like the French *armateur*, designates the maritime entrepreneur, the person with the prime economic interest in the ship's operations, the man who gives orders to the captain. The English language has no precise equivalent. In this translation the term normally used for such a person is "shipowner," notwithstanding that the *exercitor* may not in fact own the ship (and indeed cannot in law do so if he is a slave or son-in-power). To describe the activity of the *exercitor* the terms "manage" and "management" are used, and it has occasionally seemed fitting to use

the voyage or contracts or pays for repairs to the ship or promises the sailors their wages. 8. Is the borrowing of money to be treated as "on account of those matters" for which he was appointed? If the money was borrowed for a purpose for which the captain was appointed, I agree with Pegasus that the action should lie; for he might well borrow money for the fitting out or equipment of the ship or for the maintenance of the crew. 9. Here Ofilius asks whether the shipowner should be held liable if the captain borrows money for the repair of the ship and then converts it to his own use. He says that if the captain borrowed the money on the terms that he would spend it on the ship and then changed his mind, the shipowner would be liable and would have only himself to blame for appointing such a person, but that the case is different if the captain intended to defraud the creditor all along and took care not to specify that he was borrowing the money for the ship. Pedius approves of this distinction. 10. The shipowner and not the creditor must bear the loss if the captain misrepresents the price of the goods he buys. 11. If someone lends money for the repair of the ship and the captain pays him off with money borrowed from someone else, I think that the latter person should be entitled to sue as if he had made the loan for the purposes of the ship. 12. So the terms of the appointment let contractors know where they stand. If the captain takes on cargo when he was appointed solely to collect freight and not to take on cargo (for the shipowner himself might have done this already), the shipowner is not liable. The same applies if the captain is appointed solely to take on cargo and not to collect freight. The shipowner will not be bound if the captain exceeds the limits of his appointment when he was appointed to board passengers but not load cargo, or vice versa. Nor is the shipowner liable if the captain is appointed to take on cargo of a certain type, such as vegetables or hemp, and he loads marble or other materials. For some ships are freighters or "coasters," as they call them, and I know that most shipowners give instructions to turn away passengers and to confine operations to a certain area or a particular stretch of sea. And those ships which ferry passengers to Brindisi from Cassiopa or Dyrrachium are quite unfitted for carrying cargo, just as other ships are suitable for river traffic, but not adequate for sea voyages. 13. If there are two or more captains and no division of responsibilities, the shipowner will be liable on business transacted with any one of them. If one is to let out space and the other to collect freight or the jobs are allocated in some other way, the shipowner will be bound for what each does within his allocated role. 14. And if, as often happens, the appointment is on the terms that neither should do anything without the other, a person who contracts with just one of them will have to bear the loss. 15. "Shipowner" in this connection designates the person to whom all the income and revenues come, even if he does not actually own the ship: He may have hired it from the owner for a lump sum or for a fixed term or without limit of time. 16. It is immaterial whether the shipowner be male or female, head of a family, son-in-power, or slave. But a *pupillus* requires his tutor's authority to manage a ship. 17. It is at our election whether we sue the shipowner or the captain. 18. The shipowner is not provided with any comparable action against those who contract with his captain, because he does not have the same need for such a remedy. He can sue the captain on the contract of employment if the captain's services were paid for or on the contract of mandate if they were gratuitous. In practice, however, the prefects in charge of the corn supply and the governors of the provinces usually grant shipowners an informal remedy on the contracts of their captains. 19. If a shipowner is in the power of another and is

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the word "manager" to refer to the entrepreneur himself, despite the risk of confusion with the "manager" of a land-based business, the *institor*, whose analog at sea is not the *exercitor* but rather the *magister*.

It would be normal to translate *magister*, the person in physical charge of the vessel, as "master," but since the *magister* may be a slave, this would be to court confusion with the person who owns him; and that person cannot here be called "owner" for fear of confusion with the owner of the ship or *exercitor*. Accordingly, *magister* is invariably rendered as "captain," and "master" refers to the owner of a slave.

managing the ship with his consent, the person with power over the shipowner may be sued on dealings with the captain. 20. However, although an action lies against the person with power over the shipowner, it lies only if he has given his consent to the management of the ship. Granted this consent, the person with power over the shipowner is held liable in full, since the management of ships is of the greatest public importance. With business managers it is different; for the business manager's contractors can only claim that the master who knew that the manager was trading with his *peculium* should make a distribution. But suppose that when a contract was made with the captain, the person with power over the shipowner knew of the appointment but did not consent to it. Should he be held liable in full as if he had consented, or made liable by analogy, to make distribution? The question is a delicate one, so it is better to stick to the words of the edict: Mere knowledge in itself should not be a ground of liability in shipping cases, nor should consent lead to full indemnity in cases of trading with the *peculium*, as Pomponius seems to suggest when he says that one is liable in full if a person in one's power does business with one's consent, but only up to the amount of the *peculium* if it falls short of that. 21. "People-in-power" may be of either sex, sons or daughters, male or female slaves. 22. If a ship is managed by a slave with the consent of a son-in-power (or by an underslave with the consent of the slave) to whose *peculium* he belongs, the son will be liable in full, but the father or master, unless he consented, will be liable only up to the amount of the *peculium*. Of course, if the father or master did consent to the ship's being so managed, he will be liable in full, as will the son if he also consented. 23. Although the praetor only promises an action in respect of dealings with the ship's captain, nevertheless, as Julian says, contracts made with the son or slave who manages the ship also render the father or master fully liable. 24. The action against the shipowner derives from the captain, and, therefore, an action against either bars an action against the other. Anything paid by the captain diminishes the obligation by operation of law, and anything paid by the shipowner, whether on account of his own praetorian liability or on behalf of the captain, diminishes the obligation on the ground that a person is released by payments made on his behalf. 25. If a ship is being managed by several people, each may be sued for the full amount.

2 GAIUS, *Provincial Edict, book 9:* For otherwise a person who dealt with a single contractor would have to split his suit between several defendants.

3 PAUL, *Edict, book 29:* And it is immaterial what share each had in the ship, for whoever pays can recover from the others by suing on the partnership.

4 ULPIAN, *Edict, book 29:* But if a ship is being managed personally by several owners, they are liable in proportion to their shares in the management; for they are not treated as being each other's captain. 1. If one of a number of owners is appointed captain of a ship by the rest, they may each be sued for the full amount. 2. If a slave owned in common manages a ship with the consent of his masters, the solution is the same as in the case where there are several shipowners. If only one of the masters consented, he would clearly be liable in full, so I think that they would all be liable in full in the case given. 3. If a slave who is managing a ship with his master's consent is transferred to another master, the transferor remains liable, so too if the slave dies;

for he remains liable on the death of the captain as well. 4. These actions are perpetual and both actively and passively transmissible; thus, this action, unlike the action on the *peculium*, still lies more than a year after the death of a slave who was managing a ship with his master's consent.

5 PAUL, *Edict, book 29:* If you should appoint a person in my power to be captain of a ship, I can sue you on any contract I make with him; the same is true if he is a slave we own jointly. You will, however, be able to sue me on the contract of hire, since you have hired the services of my slave, and if he contracts with a third party, you can sue me for the transfer of the actions I thereby acquire, just as you could sue a freeman you had hired; if the services were gratuitous, the action would be one of mandate. 1. Likewise, if I contract with the captain of a ship which is being managed by my slave, I can perfectly well sue the captain by any action, civil or praetorian, I may have; for this edict does not stop anyone suing the captain; it grants a new action rather than transfers an existing one. 2. If one of those who are managing a ship makes a contract with the captain, he can sue the other managers.

6 PAUL, *Short Notes, book 6:* A master who did not consent to his slave's management of a ship will be liable to an action for distribution if he was aware of it, and to an action on the *peculium* if he was not. 1. If a slave owned in common manages a ship with the consent of his masters, each of them may be sued in full.

7 AFRICANUS, *Questions, book 8:* Stichus, appointed captain of a ship by Lucius Titius, borrowed money and gave a *cautio* saying that the loan was for the repair of the ship. Does the lender in an action against Titius as shipowner have to prove that the money was actually spent on repairing the ship? The answer is that the moneylender can sue if the repairs to the ship were needed at the time the money was lent. Of course, the lender must not be forced to do the owner's job and supervise the repairs himself, which would be the result of making him prove that the money was actually spent on the repairs, but he can be required to ensure that the loan is for a purpose within the captain's authority, which can only be the case if the repairs are actually needed. It follows that even supposing the ship did actually need repair, the shipowner should not be liable in full if the loan was much larger than was necessary for that purpose. 1. One may even have to ask whether the thing to be purchased with the borrowed money was available in the place where the loan was made. Take the case where money is lent for the purchase of a sail and no sail is to be had in the whole island. In brief, the moneylender must act with some circumspection. 2. And much the same is to be said with respect to the action in respect of a business manager. There, too, if the moneylender ensures that the purchase of the merchandise is necessary and within the slave's authority, it is sufficient if he made a loan for this purpose, and it is not required that he himself should go to the trouble of seeing that the money was actually spent for that purpose.

2

THE RHODIAN LAW OF JETTISON

1 PAUL, *Views, book 2:* The Rhodian law provides that if cargo has been jettisoned in order to lighten a ship, the sacrifice for the common good must be made good by common contribution.

2 PAUL, *Edict, book 34:* If goods have been jettisoned because the ship was in difficulty, the owners who have lost the cargo for whose carriage they contracted may sue the captain on their contracts. Then, the captain may bring an action on his contracts of carriage against the others whose goods have been saved, so as to distribute the loss proportionally. Servius once advised that the suit on the contract of carriage against the captain is to make him hold onto the cargo of the other shippers until they pay their part of the loss. But even if the captain does not retain their goods, he will still have an action against the shippers; for there might be people who have no baggage. But certainly, it is more convenient to detain any baggage they have. If he has hired the whole ship, he may bring an action on that charter just as passengers would who had chartered space on the ship; for it is only fair that the loss should be shared by all those whose property has been saved by means of the sacrifice of the property of others. 1. If the ship suffers damage or loses any of its gear and the cargo is unharmed, no contribution is due, because there is a distinction between property relating to the ship and property on which freight is paid; after all, the damage arising when a smith breaks his anvil or hammer would not be charged to the customer who gave him the work. But a loss at sea falls to be made good if it arises from a decision of the cargo-owners or a reaction to some danger. 2. A vessel carrying diverse cargoes shipped by many merchants in addition to many passengers, both slave and free, was overtaken by a serious storm and had to be lightened. The questions put were whether the people whose goods, such as jewels and pearls, added no weight to the ship had to contribute like everyone else, in what proportion the loss should be split, whether anything was due in respect of the free passengers, and by what action the matter should be proceeded with. It was agreed that all those who had benefited by the jettison must make their contribution, including the owner of the ship for his part, because the contribution is levied on property preserved. The total amount of the loss should be apportioned in relation to the market value of the property, freemen not being valued. The owners of the property sacrificed should sue the mariner, that is, the captain, on the contract of carriage. When it was asked whether the value of everyone's clothes and jewelry should be taken into account, it was agreed that one should take account of the value of all property except what was put on the ship for purposes of consumption, such as foodstuffs, the reason for the exception being that if victuals ran short during the voyage, everyone would make common cause with what he had. 3. Servius, Ofilius, and Labeo say that everyone must contribute if the ship is ransomed from pirates. But the owners must bear the loss of any property stolen by

the robbers, and a person who ransoms his own goods has no claim for a contribution. 4. The usual amount of contribution depends on the value of the property saved and lost respectively. It is immaterial if the property lost could have been sold at a premium, since what is to be made good is loss suffered and not gain foregone. But the valuation of the property from which contribution is due must be in terms of what it would fetch, not what it cost. 5. No valuation is put on slaves who have been drowned, any more than if they had sickened and died on board or thrown themselves into the sea. 6. It is not for the captain to bear any loss due to the insolvency of a passenger; for it is not a mariner's responsibility to check everyone's financial standing. 7. The burden of contribution disappears if jettisoned property surfaces. If the contribution has already been paid, those who have paid may sue the captain on their contract with him and get what he can collect by suing the recipients on the contracts he has with them. 8. Jettisoned goods remain the property of their owner; they are not treated as having been abandoned and so do not become the property of whoever picks them up.

3 PAPINIAN, *Replies, book 19:* Contribution is due if the mast or other piece of ship's equipment is cast off to allay a common danger.

4 CALLISTRATUS, *Replies, book 2:* If a ship is so laden that it cannot enter a river or port, and in order to lighten the ship lest it come to harm outside the river or in the harbor or port some of the cargo is transferred to a dinghy, those whose cargo is safe in the ship are liable to contribute to those who lose their property in the dinghy, if it sinks, just as if their property had been jettisoned. Sabinus accepts this in the second book of his *Replies*. Contrariwise, if the dinghy is saved with its part of the cargo and the ship goes down, those who lose their goods in the ship have no claim because jettison comes into contribution only if the ship is saved. 1. Sabinus also advised that if a ship which had been lightened in a storm by throwing overboard the goods of one merchant is sunk at a later stage of the voyage and the goods of some other merchants are recovered by paid divers, the merchant whose goods were jettisoned is entitled to a contribution from those whose goods were subsequently recovered by the divers. But those whose goods are not so recovered have no recourse against the person whose property was jettisoned during the voyage even if divers get some of it back for him, since their goods cannot be seen as having been jettisoned to save a sinking ship. 2. When goods have been thrown overboard, we must see whether contribution is payable by a person whose goods remained on board but were damaged, since he should not have the double burden of paying a contribution as well as suffering the property damage. One could justify making him pay a contribution on the basis of what his goods are now worth; thus, for example, if two people had goods worth twenty and owing to water damage the goods of one of them are reduced in value to ten, the one whose goods are undamaged should contribute for twenty and the other for ten only. But we can make this view subject to a distinction turning on the cause of the damage whether the damage occurred because the jettison left the goods exposed to harm or for some different reason, such as that sea water got into whatever corner of the ship they were stacked in. In the latter case, he will have to pay up, but is he exempt from the duty to contribute in the former case on the ground that he too was victim of the jettison? Surely, he should not have to contribute if his property has suffered water damage on account of the jettison? The distinction to apply is the subtler

one of the respective sizes of the loss and the contribution. If, for example, in relation to property worth twenty, the contribution would be ten and the loss is two, the contribution should be on the balance which is left when the amount of the loss is deducted. Then, what if the damage exceeds the amount of the contribution? Say, for example, that the value of the property has dropped by ten and the contribution is only two. Certainly, he should not have to bear both burdens. Indeed, here we must see whether he should not receive a contribution. For what difference is there between losing one's property by jettison and having it uncovered? As Papirius Fronto advised, subvention is due as much to the person whose goods have deteriorated as to the person whose goods are lost through the jettison.

5 HERMOGENIAN, *Epitome of the Law, book 2:* Those who save their goods in a shipwreck need not club together to pay for the loss of the ship; for the equity admittedly applies only if things are thrown overboard in the interests of the others facing a common danger and the ship is saved. 1. The equity of contribution does apply if the mast is cut down so that ship and cargo may be saved.

6 JULIAN, *Digest, book 86:* The mast and riggings of a ship which had been caught in bad weather were struck by lightning and burnt. After putting in to Hippo where it was equipped with temporary riggings, the ship proceeded to Ostia with its cargo safe and sound. Should the cargo-owners contribute toward the loss of the shipowners? The advice was that they need not do so; for the expenditure was incurred more to equip the ship than to save the cargo.

7 PAUL, *Epitome of the Digest of Alfenus, book 3:* His opinion was that if a ship was stranded or sunk, a person could keep anything of his he could save from it, just as in a fire.

8 PAPINIAN, *From Minicius, book 2:* The person who jettisons goods for the purpose of lightening a ship does not intend to abandon them, for he would take them back if he found them, and he would go to collect them if he guessed where they had fetched up; he is like a man with a heavy weight to carry who sets it down in the street and is soon going to return for it with others.

9 VOLUSIUS MAECIANUS, *From the Rhodian Law:* Petition of Eudaemon of Nicomedia to the Emperor Antoninus: "Antoninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades." Antoninus replied to Eudaemon: "I am master of the world, but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it." Augustus, now deified, decided likewise.

10 LABEO, *Plausible Views, Epitomized by Paul, book 1:* If you contract for the carriage of slaves, you need not pay freight in respect of any slave who dies en route. PAUL: But this depends on the agreement, whether freight was payable for the slaves who were loaded or for those who were landed. If it is not clear what the agreement was, it will be enough for the captain to prove that a slave was put on board. 1. If you have chartered a ship for the carriage of your cargo and the captain needlessly tranships the cargo to a less good vessel, knowing that you would disapprove, and your cargo goes down with the ship when carrying it, you have an action on the charter party against the original captain. PAUL: But not if both ships go down on that voyage, in the absence of intentional or negligent fault on the part of the crew. So, too, if the first captain were detained by the authorities and prevented from sailing with your goods. It would be the same if his contract was to pay you a fixed penalty for

failure to deliver your goods at the agreed destination before a certain day, provided that it was not his fault [that he does not do so; he may expect remission of the penalty]. A similar line of thought underlies the rule when it is proved that the captain was unable to sail because he was ill, and the same must be said if his ship becomes unfit without any fault, deliberate or negligent, on his part. 2. If you hire a ship capable of carrying two thousand jars and you load jars on it, you must pay freight for two thousand jars. PAUL: But the freight for two thousand jars will only be payable if the ship was hired at a flat rate. If the freight was fixed in relation to the number of jars loaded, the result is different, for you will only owe freight for the number of jars you put on board.

3

THE ACTION FOR THE BUSINESS MANAGER'S CONDUCT

1 ULPIAN, *Edict, book 28:* The praetor thought it fair that since people benefit from the acts of their business managers, they should be liable and suable on the contracts they make. But he gave no analogous action to those who appoint a manager. If the manager a person appoints is his own slave, he will be safe enough because the actions will vest in him. But he has no action if he appoints someone else's slave or a free person; of course, he will be able to sue the manager himself or his owner either on the basis of mandate or of unauthorized administration; but Marcellus thinks that the person who appoints a business manager should be given an action against those who have contracted with him,

2 GAIUS, *Provincial Edict, book 9:* the action appropriate to the contract which the manager entered into, if that is the only way in which the person making the appointment can protect his interests.

3 ULPIAN, *Edict, book 28:* The manager is called *institor* because the business is transacted at his instance; and it is largely immaterial whether it is a shop or any other kind of business that he runs,

4 PAUL, *Edict, book 30:* since sometimes tradesmen take their merchandise to the homes of the upper class and make their sales there. The place of purchase and sale does not alter the basis of the action, since either way the purchase or sale is by the manager.

5 ULPIAN, *Edict, book 28:* Whatever kind of business, therefore, he has been charged with, it is right to call him *institor.* 1. So Servius in his first book *On Brutus* says that transactions with the manager of an apartment block or with the clerk of works of a building or with a person commissioned to buy corn render the person appointing him liable in full. 2. Labeo also wrote that full liability attaches to the person who appoints another to lend money or to run a farm or to be a trader or a public contractor. And he will be liable on account of a slave whom he appoints to run a bank. 4. Furthermore, the name of *institor* has been applied to pedlars, as they are called, people to whom tailors and cloth merchants entrust clothes to hawk and sell. 5. Even muleteers can properly be called *institores* as can those who are appointed by launderers and tailors. 6. Livery stablekeepers are also to be treated as *institores.* 7. Labeo adds that if a shopkeeper sends his slave traveling to buy merchandise and consign it to him, the slave is to be treated as an *institor.* 8. He also says that if a slave robs one

of the corpses he was to prepare for burial, the undertaker is liable to a claim based on the action for the manager's conduct, notwithstanding that actions for theft and for insult would also lie. 9. Labeo says, too, that a baker who regularly sends a slave to sell bread in a particular place will certainly be liable if with his consent the slave takes payment in advance for the daily delivery of bread and then becomes insolvent. 10. Suppose that a person setting out on a voyage leaves his whole laundry business in the hands of his apprentices to whom he asks his customers to give their orders and that after he has gone, an apprentice takes in clothes and makes off with them. The launderer will be liable if the apprentice was left as a business manager, but not if he was left as a kind of personal agent. Of course, if he had warranted that I could trust his staff, he can be sued on the contract of work, not on the business manager's conduct. 11. Not all transactions with a manager bind the person who appointed him, but only contracts relating to the matter which he was appointed to manage, that is, only those within the scope of the appointment. 12. So that if I appoint a person to sell merchandise, he can render me liable to an action by a buyer; likewise, if I appoint him to make purchases, I may only be sued by a seller. I shall not be liable on sales made by a person I appointed to purchase, nor on purchases made by a person I appointed to sell. Cassius accepts this. 13. But if a manager appointed to buy merchandise borrows money, the lender may bring an action for the manager's conduct; and the same is true, in my opinion, if money is borrowed by a person appointed to pay the rent of a shop, provided that borrowing was not forbidden. 14. If my manager borrows oil when I appointed him to buy and sell it, I must be liable to an action for the manager's conduct. 15. Likewise, if the manager, in selling oil, takes a ring as earnest and does not return it, then, unless he was to sell only for cash, the master will be liable to an action on the manager's conduct, because the transaction was in connection with what he was appointed to do. Thus, if a manager takes security for the price, an action in respect of his conduct will lie. 16. Likewise the *actio institoria* is available to the guarantor who intervened for the business manager: for that is a consequence of that transaction. 17. If the person who appoints a manager dies and his heir continues to use the same manager, there is no doubt that the heir must be held liable; and equity requires that the action on the manager's conduct be available to a person who contracted with the manager without notice that the heir had not yet entered on the inheritance. 18. If a manager is appointed by my general agent or curator or tutor, an action lies as if I had appointed him myself.

6 PAUL, *Edict, book 30:* But the general agent himself will also be liable to an action on account of the manager's conduct, if he is an agent for all purposes.

7 ULPIAN, *Edict, book 28:* The same is true if someone managing my affairs with my authority appoints a manager and I ratify the appointment 1. It is immaterial whether the manager is male or female, free or slave, or, if a slave, one's own or someone else's. Likewise, it is immaterial who makes the appointment. If the appointment is made by a woman, she will be liable to an action for the manager's conduct, just as

she would be to an action for the conduct of a ship's manager, and if a woman is appointed manager, she will be held liable. And the action for the manager's conduct lies equally if the person appointed is a daughter-in-power or a slave-girl. 2. A person who appoints a pupil to be manager is liable to an action for the manager's conduct since he has only himself to blame.

8 GAIUS, *Provincial Edict, book 9:* For boys and girls are quite often put in charge of shops.

9 ULPIAN, *Edict, book 28:* A *pupillus* who himself appoints a manager will only be bound if he has his tutor's authority.

10 GAIUS, *Provincial Edict, book 9:* But he can be sued to the extent of any enrichment he has received.

11 ULPIAN, *Edict, book 28:* If a *pupillus* becomes heir to a person who had appointed a manager, it is only fair that he should be held liable as long as the manager remains in charge; for the tutors should have removed him if they did not want to use his services. 1. And a person who is under twenty-five years of age when he appoints a manager can only be relieved on account of his youth after a preliminary inquiry. 2. No one is treated as a manager if public notice has been g ven in writing that contracts are not to be made with him. It is not that the would-be-contractor needs permission, but that the person wanting to avoid contracts should prohibit it; for otherwise the mere fact of appointing the manager will lead to liability. 3. By "public notice" is meant a notice in writing, clearly visible and easily read, in the open, for example, in front of the shop or the place of business, not hidden away but on display. Should the notice be in Greek or Latin? It depends on the locality; no one should be able to claim that he did not know what the notice said. Certainly, if the notice was posted openly and was widely read, no one will be heard to say that he did not see it or know what it said. 4. But the notice has to be there permanently. An action for the manager's conduct will lie if the notice was not on display when the contract was made or if its text had been effaced. Thus, the owner of the shop will be liable if the notice he put up has been removed by a third party or has collapsed through age or been obscured by bad weather or something like that. But if the manager himself took down the notice with fraudulent intent, the loss from his fraud must fall on the person who appointed him, unless the contractor also was party to the fraud. 5. The terms of the appointment should be respected. For example, the person making the appointment may have wished the manager to enter transactions only on certain terms or with the approval of a particular person or if security was given or only within a certain limit. The fairest thing is to abide by the terms of the appointment. Likewise, a person who has appointed several managers might wish transactions to be concluded by all of them together or by one of them on his own. No one should be suable for the conduct of a manager by a person he has told not to do business with him; for we are entitled to prohibit dealings with a particular individual or with a given class of people or tradesmen and yet permit dealings with others. But a person who keeps changing his mind and forbids contracts to be made now with one person and now with another will be liable in all cases; for it is wrong to confuse one's contractors. 6. A person who has been forbidden to contract altogether is not treated as a manager at all; his role is rather that of a storeman than of a manager, so he will be unable to sell even two bits of merchandise from the shop. 7. If it is a proper case for an action on the manager's conduct, the action for a distribution is automatically excluded; for the action for a distribution does not lie where the merchandise belonged directly to the master. But if it was not the master's store he was managing, the action for a distribution may lie as well. 8. If I appoint as manager of my store an underslave whose services I have

hired from a slave of yours, there will be a good sale if you buy goods from him; for even if a master is not bound by a purchase he makes from his own slave, it is nevertheless a sale, and in his quality as purchaser, the master can acquire possession and prescribe title to the goods.

12 JULIAN, *Digest, book 11:* So I shall be liable to an *actio utilis* for the manager's conduct, and I can sue you either by an action on the *peculium* of the superior slave, relying on the contract of hire, or on the *peculium* of the underslave, seeing that I entrusted him with the sale of the goods; you can also be treated as having benefited to the extent of the price of the goods, since this was a sum you owed to your slave.

13 ULPIAN, *Edict, book 28:* A person had appointed a slave to run an oil business in Arles and also authorized him to borrow money. The slave borrowed some money, and the lender, thinking that the loan was for the business, brought an action for the manager's conduct but was unable to prove that it was indeed a business loan. This exhausted his claim so that he was unable to bring another action on the basis that the man had been appointed to take loans, but Julian nevertheless said that he should have an *actio utilis*. 1. One should bear in mind that the master ceases to be liable to an action for the manager's conduct, once the obligation is novated by the manager or by someone else in response to a stipulation made for that purpose. 2. If two or more people have a shop and appoint as manager a common slave whom they own in unequal shares, should they be liable in proportion to their shares in the slave or in equal shares or in proportion to their shares in the business or should they be held liable in full? Julian, who raised the question, said that each may be sued for the full amount by analogy with the action against the shipowner and the action on the *peculium*. The person sued can recover part of what he is made to pay by an action on the partnership or for the division of property. This view we have already endorsed above.

14 PAUL, *On Plautius, book 4:* It is the same if a slave belonging to a third party is appointed to manage a shop owned in common; each owner is liable to be sued for the full amount, and each may reclaim part of what he has paid by an action of partnership or for the division of property. Of course, if there is no action of partnership or for the division of property, each must be held liable only for his proper part; this happens if the slave to whom a loan has been made is freed and the master has appointed two heirs; since no divisory action lies between the heirs, each of them must be sued for his own part.

15 ULPIAN, *Edict, book 28:* Finally, it must be noted that these actions are perpetual and are transmissible both actively and passively.

16 PAUL, *Edict, book 29:* Since a bailiff is appointed to farm rather than to trade, a person who deals with the bailiff of another has no action against the owner; but if I authorize my bailiff to sell goods as well, it is fair that I should be liable to an action based on the action for the manager's conduct.

17 PAUL, *Edict, book 30:* If a person is appointed to buy and sell slaves or horses or cattle, the person who so appoints him not only is liable to an action for the manager's conduct but is also fully liable in an action of rescission and in an action for warranty of title whether for double or for single damages. 1. If you have appointed Titius's slave as your manager, I can either use this edict to sue you or sue Titius under the edicts yet to be mentioned. But if you have forbidden him to make contracts, Titius alone can be sued. 2. If a contract is made with a manager appointed by a father who has since died and left an *impubes* as his heir, we must say in the interests of commerce that an action lies against the *pupillus*, just as when a contract is made with a manager who was appointed by the authority of a tutor now deceased. 3. Pomponius

wrote that an action should lie on a contract which was formed before the inheritance was taken up, even if the eventual heir is mad; for there is nothing wrong in contracting with the manager of a business though one knows of the master's death. 4. If I had given you notice not to lend money to a slave whom I had appointed, Proculus says that my defense takes the form, "unless it appears that the defendant gave notice to the plaintiff not to lend money to that slave." But if the *peculium* was increased or I obtained a benefit out of the transaction and am unwilling to pay you the amount by which I am enriched, you will be able to rely on the ground that I am acting fraudulently; for it counts as fraud to try to profit from another's loss. 5. These facts would also give rise to a *condictio.*

18 PAUL, *Readings, sole book:* A manager is a person who is appointed to buy or sell in a shop or in some other place or even without any place being specified.

19 PAPINIAN, *Replies, book 3:* A person who appoints a procurator to borrow money is liable to an *actio utilis* based on the action for the manager's conduct; and the action should be granted even if the procurator formally promised repayment at the borrower's stipulation and has funds of his own. 1. If a master frees a slave whom he has appointed to manage a bank and then continues the business through him as a freedman, the change of status does not alter the incidence of risk. 2. A father put his son in charge of a shop. The son borrowed money to buy goods, and the father acted as guarantor for the loan. The father can be sued by the action for the manager's conduct, since by guaranteeing the loan he made it look like part of the business of the shop. 3. If a slave who has been appointed exclusively to make loans at interest goes surety for a borrower from someone else, his owner does not become fully liable by praetorian law; but if a person borrows money from him and he agrees to pay off sums due by that person to a creditor, the creditor can sue the master, for the master has an action on the loan against the person on whose behalf the payments were to be made.

20 SCAEVOLA, *Digest, book 5:* Lucius Titius appointed a freedman to manage a moneylending business of his. The freedman issued the following *cautio* to Gaius Seius: "Greetings to Domitius Felix from Octavius Terminalis, acting for Octavius Felix. You have to your credit in my patron's bank the sum of one thousand denarii, due from me to you on April 30." Could Terminalis be sued at law on the basis of this letter when Lucius Titius died without heir and insolvent? The reply was that these words gave rise to no legal obligation on his part nor to any liability in equity, since they were written in his capacity as manager in order to maintain the credit of the business.

4

THE ACTION FOR DISTRIBUTION

1 ULPIAN, *Edict, book 29:* One of the advantages of this edict is that it treats the master as an external creditor if he was aware that his slave was trading with the stock of the *peculium,* whereas in other cases he is privileged in respect of his slave's contracts, being liable only for what remains in the *peculium* after everything due to himself has been deducted. 1. Pedius says in his fifteenth book that the edict should be extended to business activities of all kinds, although "stock" is rather too narrow a word to apply to slaves who are launderers or tailors or weavers or vendors of slaves. 2. In the phrase "stock of the *peculium,*" the word *peculium* does not refer, as it usually does, to what remains after deducting what is owed to the master;

for even if the *peculium* is in debt, there may well be stock in it, and if so, the master will be liable to an action for distribution, supposing he knew that it was being used for trade. 3. Knowledge in this sense requires assent, but not active volition, in my view, only passive consent; the master need not be willing, provided he is not unwilling. Thus, if he knows of the trading and neither opposes nor forbids it, he will be liable to an action for distribution. 4. In referring to people in power, the edict covers everyone, of either sex, who is in the power of another. 5. The action for distribution applies not only to one's actual slaves but also to those who are genuinely thought to be one's slaves whether they are really free or the slaves of others; it also applies to slaves in which one has a usufruct

2 PAUL, *Edict, book 30:* provided always that one owns the stock-in-trade of the *peculium.*

3 ULPIAN, *Edict, book 29:* If a slave has two owners and both of them know that he is trading, the action lies against each of them. If one of them knows and the other does not, the action lies against the one who knows, subject to a deduction of all that is owed to the one who did not know. If suit is brought against the ignorant master, it must be by way of action on the *peculium;* so a full deduction must be made of anything owed to the master with knowledge, just as it would be if he himself had been sued on the *peculium.* This is in line with what Julian says in the twelfth book of his *Digest.* 1. A *pupillus* or madman whose tutor or curator knows that the slave is trading with the stock of his *peculium,* in my opinion, should not be prejudiced by the fraud of his tutor or curator, but he should not benefit from it either, so the tutor's fraud will render the *pupillus* liable to an action for distribution up to the amount of the benefit he receives; the same applies where the owner is mad. Pomponius, indeed, in the seventh book of his *Letters,* was of opinion that the *pupillus* should be held liable for the tutor's fraud if the tutor is solvent; I agree that he should certainly be bound to the extent of transferring his claim against the tutor. 2. A *pupillus* who was party to a fraud and old enough to be legally capable of it should be held liable even if he did not know enough about the trading to make him liable on that account. The result, therefore, is that subject to what I have said about the effect of fraud, the availability of the distributive action depends on the knowledge of the tutor or curator.

4 PAUL, *Edict, book 30:* Liability under this edict attaches to a *pupillus* who acts fraudulently after reaching puberty, given that his tutor was aware of the trading, and to a madman who acts fraudulently in a lucid interval.

5 ULPIAN, *Edict, book 29:* Both Pomponius and I regard it as evident that the knowledge and fraud of a general agent must be imputed to the master. 1. I am liable to an action for distribution if I know that an underslave of mine is engaged in trade. If I do not know, but my slave does, I am liable to an action on the *peculium* of the underslave, as Pomponius says in his sixtieth book; I may deduct from the *peculium* of the underslave what is owed to me, but not what is owed to the slave. If we both knew, he says, I shall be liable not only to an action for distribution but also to an action on the *peculium,* the former in respect of the underslave, the latter in respect of the *peculium* of the slave, and the plaintiff will have to choose which of these actions to bring. Debts due to me and debts due to my slave will both qualify for proportional deduction "in respect of the stock" is proper; for, otherwise, every transaction with the slave might give rise to an action for distribution. 5. In this action, all the proceeds of if the person doing the trading is a slave-girl. 3. It is immaterial whether the contract is made with the slave himself or with his business manager. 4. The qualification "in respect of the stock" is proper, for, otherwise, every transaction with the slave might give rise to an action for distribution. 5. In this action, all the proceeds of the stock and any income attributable to it are distributed. 6. The parties to the distribution are, on the one hand, those in whose power the trader is and, on the other,

the creditors of the business. 7. Does the master qualify for a distribution only in respect of business debts or other debts as well? Labeo says that it is immaterial what the debt was for and whether it was incurred before or after the slave started trading; the master is sufficiently disadvantaged by losing his privilege of deduction in full. 8. If contractors have been granted a security interest in the stock itself, I think that their security right gives them priority over the master. 9. One must take into account not only what is due to the master but also what is owed to persons in his power. 10. If there are two or more owners, distribution will be made to each of them in proportion to his part of the debt. 11. It is not the whole of the *peculium* which is distributed, but only what arises from its stock, either the goods themselves or such proceeds of their sale as has been received by the *peculium* or invested in it. 12. Money still due to the business from the slave's regular customers is treated as received and ranks for distribution. 13. Does any plant the slave may have in his shop rank for distribution along with the stock? Labeo very justly says that it does, for such plant generally, if not invariably, comes from capital. Other items in the *peculium*, however, such as money or gold, are not brought into account unless they are the proceeds of the business. 14. Thus, distribution is due even in respect of slaves engaged in the business if they were purchased with its proceeds. 15. Suppose that the slave runs both a garment factory and a textile works, and keeps their customers separate; should the creditors of such different enterprises be lumped together and called for distribution as a group? In my opinion, separate distributions should be made; for they all put their trust in the enterprise rather than the entrepreneur. 16. Even if the slave has two similar shops, one in Bucinum where I take my custom and one across the Tiber where others go, I think it fairest to have separate distributions; otherwise, some people might be able to satisfy themselves out of the assets of others and so shift their losses to them. 17. But in any one branch all remaining unsecured goods must be distributed among all the creditors, even if they were bought with funds provided by one of them alone. 18. If I hand over property for sale and it is still in physical existence, it may seem hard that I should be called into the distribution. Distribution will be appropriate if I have become a mere creditor, but otherwise I should be able to claim the goods as my property, since even if I had sold them, they would only cease to be mine if the price had been paid or security given or satisfaction provided in some other manner. 19. Since distribution is made to claimants in proportion to their claims, a creditor who is the only one to come forward obtains payment of his debt in full; but since there may well be other trading creditors of the *peculium*, the first claimant must give a *cautio* to make a *pro rata* refund to any other creditors that appear.

6 PAUL, *Edict, book 30:* For in this action all creditors are treated alike, regardless of the time of claim, whereas in an action on the *peculium* the first comer takes all.

7 ULPIAN, *Edict, book 29:* He must also give a *cautio* to make a *pro rata* refund to the master, should any other debt due to him emerge, such as an undiscovered debt or one which is conditional or about to mature. This is perfectly acceptable, since the owner should not be treated unjustly even if he is bound to a distribution. 1. What if the owner does not want the trouble of effecting the distribution, but is ready to part with the *peculium* or its stock? Pedius very fairly says that this is acceptable; the praetor

should generally appoint a special arbitrator to superintend the distribution of the stock of the *peculium*. 2. A person who fraudulently causes too small a distribution to be made is liable to a distributive action and must pay the amount by which the actual distribution fell short of what it should have been. This action keeps the master from acting fraudulently. "Too small a distribution" includes no distribution at all. However, a distribution which is too small because the master did not know what the slave had in stock is not regarded as a fraudulent underdistribution, though it will be fraudulent of him not to increase the distribution once he learns the truth. Certainly, he will be guilty of fraudulent underdistribution if he uses that property to pay himself. 3. The master is liable to an action for distribution if he fraudulently lets the property get lost or diverts it or deliberately sells it at too low a price or fails to collect the price from purchasers. 4. Does the action for distribution lie if the master denies that any debts are due? Labeo was of opinion that it does, and this is the better view; for otherwise it would be to the master's advantage to make the denial. 5. This action is without limit of time and lies against the heir for the amount by which he has benefited,

8 JULIAN, *Digest, book 11:* because this is a restitutionary action, not an action of fraud. Thus, the master is liable even after the death of the slave, and his heir, too, is rendered liable without limit of time by the deceased's behavior. And this is true although the action only lies if fraud has occurred.

9 ULPIAN, *Edict, book 29:* What applies to an heir applies to other successors as well. 1. The plaintiff must choose between the action on the *peculium* and the action for distribution, knowing that there can be no recourse to the other. Of course, it is possible for a person, if he wishes, to proceed to an action for distribution on one claim and to an action on the *peculium* on another. 2. If the slave is manumitted under the master's will and receives his *peculium* as a legacy, the heir should not, according to Labeo, be liable to an action for distribution, because he is neither enriched nor guilty of fraud. But Pomponius says in his sixtieth book that the heir should make the slave give a *cautio* or withhold the contributable sum from the *peculium*, and that he is liable to an action for distribution if he fails to do so; this is reasonable enough; for it is fraud so to act as to prevent a distribution. Thus, whenever the decedent is guilty of fraud, the heir is liable to the amount of his enrichment; when he himself is fraudulent, this limitation does not apply.

10 PAUL, *Edict, book 30:* The purchaser of a slave can be sued in an action on the *peculium*, but not in an action for distribution.

11 GAIUS, *Provincial Edict, book 9:* Sometimes it pays to bring an action on the *peculium* rather than an action for distribution; for one thing, in an action for distribution, only the property and proceeds of the business are divided up, whereas an action on the *peculium* involves the entire amount of the *peculium*, including the property of the business. Again, perhaps only half of the *peculium* or a third or even less was being used for trade. Furthermore, it may be that no debts are owed to the father or master.

12 JULIAN, *Digest, book 12:* If one plaintiff is suing on the *peculium* and another is suing the master for a distribution on account of the same slave, may the master deduct from the *peculium* what he is going to have to pay the plaintiff in the distributive action? The answer is that a distributive action lies only if the master, in distributing the value of the property, has failed to comply with the praetor's edict, that is, if he has deducted more of what is owed to him than he has paid of what is owed to the creditors. An example, in the case of stock worth thirty, would be where the master had advanced fifteen and two external creditors had lent thirty between them, and, instead of deducting only ten and giving the creditors ten each, the master deducts the whole of his fifteen and lets them have only the fifteen which are left. A master who

has done this is not to be taken as absolving his slave of the further five he is going to have to pay out in the distributive action, so he remains a creditor of the slave for those five and may deduct them if the *peculium* has other assets than the business and he is sued on it.

5

TRANSACTIONS ALLEGEDLY EFFECTED WITH A PERSON IN THE POWER OF ANOTHER

1 GAIUS, *Provincial Edict, book 9:* The proconsul does his best to see that whoever has dealt with a person in the power of another should be able to obtain what the justice of the case allows, even if none of the actions hitherto mentioned apply, namely the action for the conduct of a ship's captain, the action for the conduct of a business manager, and the distributive action. If the transaction was authorized by the person with power over the contractor, the proconsul grants an action for the full amount. If the transaction was unauthorized, but enured to the benefit of that person, he gives an action up to the amount of that benefit. In other cases, he has created an action on the *peculium.*

2 ULPIAN, *Edict, book 29:* The praetor has laid down: "If a person in the power of another enters into a transaction and is then emancipated or disinherited or abstains from inheriting on the death of the person with power over him, after due inquiry, I shall grant an action against him up to the amount of his present assets whether the transaction was spontaneous or authorized and whether the proceeds went into his own *peculium* or into the estate of the person with power over him." 1. And it is only fair that after due inquiry, a person should equally be liable up to the amount of his current assets if he has become independent otherwise than by emancipation or if he has been adopted and his natural father has since died or if he has inherited, but only to a very small extent.

3 ULPIAN, *Disputations, book 3:* Is this a case where debts due to others should be deducted? Among creditors who contracted with him when he was under power, the first to claim should win, unless one with a privilege should appear; for such a person should have priority. But I think that account should be taken of any creditors who contracted with him after he gained his independence.

4 ULPIAN, *Edict, book 29:* If a son is made heir for a substantial portion, the creditor may choose whether to claim the part of the debt he has inherited, or to sue him personally for the full amount. In the latter case, the judge must consider whether the judgment should not be limited to the amount of his current assets. 1. But sometimes even a son who has been disinherited or emancipated may be sued in full, for example, if he lied during the negotiations by saying that he was head of a family. For as Marcellus wrote in the second book of his *Digest,* the falsehood should make him liable even if he cannot pay. 2. Although a contractual action is limited to the amount of the defendant's assets, he may be sued in full for his delicts. 3. Only the son himself qualifies for this special treatment, and not his heir. For in the ninth book of his *Questions,* Papinian says that the son's heir can be sued for the full amount. 4. It may be that delay should be taken into account in the sense that an action brought against the son forthwith will lie for the amount of his present assets, whereas a suit brought many years later should be disallowed. In my view, this is a factor which should be taken into account when the preliminary inquiry is being made. 5. As

Proculus thought, a person who has brought an action on the *peculium* when he could have sued on the basis of the father's authorization cannot subsequently sue on the latter basis; but if he was deceived into claiming on the *peculium*, Celsus thought, and rightly so, that something should be done for him.

5 PAUL, *Edict, book 30:* If a son-in-power who had been sued and held liable in his father's lifetime is then emancipated or disinherited, the action on the judgment should be limited to the amount of his assets. 1. A disinherited son who receives the estate under the *senatus consultum Trebellianum* should be held liable for the full amount and not just to the extent of his assets, because in effect he has virtually become heir. 2. But he should be treated as having abstained from the inheritance if he intervened under compulsion to restore it.

6 ULPIAN, *Disputations, book 2:* If a son-in-power, claiming to be head of a family, acts as agent, and in that capacity becomes entitled to something promised by a third party, he is liable to his principal even if he is in no position to hand over the thing. So says Marcellus; and it is certainly true that he must be held liable, since he acted fraudulently. The same applies in all cases where the action is one of good faith.

7 SCAEVOLA, *Replies, book 1:* A father who permitted his son to borrow money wrote to a lender empowering him to make a loan. The son succeeded to the smallest possible share of his father's estate. I advised that the lender could choose between bringing an action for the full amount against the son to whom he had made the loan and suing each of the heirs in proportion to his share of the estate. Judgment against the son, however, must be limited to his current assets.

8 PAUL, *Decrees, book 1:* A slave appointed by Titianus Primus to lend money on security was accustomed in addition to take up debts owed to barley merchants and to pay them on behalf of the purchasers. The slave fled, and a person to whom he had agreed to pay the price of certain barley sued the master on the basis of the manager's conduct. The master denied that he was liable on such a suit, because what the slave had done was not what he was appointed to do. When it was shown that this slave had been involved in various other businesses, such as renting warehouses, and had made payments to many people, the prefect of the corn supply gave an opinion unfavorable to the master. We tried to argue that this should be seen as a kind of guarantee—the slave was paying off rather than taking on what was owed by another—that this does not normally render the master liable and that in this case there did not seem to be any express authorization. But the emperor upheld the opinion of the prefect since it seemed that the master had treated the slave as a general purpose surrogate.

6

THE *SENATUS CONSULTUM MACEDONIANUM*

1 ULPIAN, *Edict, book 29:* The *senatus consultum Macedonianum* reads as follows: "Whereas Macedo's borrowings gave him an added incentive to commit a crime to which he was naturally predisposed and whereas those who lend money on terms which are dubious, to say the least, often provide evil men with the means of wrongdoing, it has been decided, in order to teach pernicious moneylenders that a son's debt cannot be made good by waiting for his father's death, that a person who has lent money to a son-in-power is to have no claim or action even after the death of the person in whose power he was." 1. Any uncertainty whether or not the son is in power,

such as arises if his father is in enemy captivity, makes it uncertain whether or not the *senatus consultum* has been contravened; if the son falls back into power, the *senatus consultum* will apply, otherwise not. In the meanwhile, therefore, the action must be refused. 2. The *senatus consultum* certainly applies if a person is adrogated, borrows money, and is then reinstated by emancipation; for he was a son-in-power at the time of the loan. 3. The *senatus consultum Macedonianum* is not displaced by reason of the social position of the son-in-power; it applies to a son-in-power of high, even of consular, rank. If, however, he has a military *peculium*, then the *senatus consultum* is inapplicable

2 ULPIAN, *Edict, book 64:* up to the amount of the military *peculium*, which sons-in-power control just as if they were heads of a household.

3 ULPIAN, *Edict, book 29:* The *senatus consultum* does not apply if the lender believed the borrower to be head of a household, provided that his belief was not just foolish and ignorant, but was based on the borrower's having that appearance and reputation and on his conducting himself as such in business and public life. 1. This is why Julian says in his twelfth book that the *senatus consultum* does not apply to those who collect taxes. There have been many decisions to this effect. 2. In the same book, Julian also says that the *senatus consultum* does not apply to a person, such as a *pupillus* or youth under twenty-five, who could not know whether or not the borrower were a son-in-power. In the case of a *minor*, relief can be provided by the praetor after due inquiry, but the inapplicability of the *senatus consultum* in the case of a *pupillus* rests on another ground, which Julian should have mentioned, namely that money transferred by a *pupillus* without his tutor's authority does not constitute a loan. Indeed, Julian himself, in his twelfth book, says that the *senatus consultum* does not apply to a loan made by a son-in-power on the ground that a son-in-power cannot make a loan even if he has the free administration of his *peculium*; for in allowing the son to manage his *peculium*, the father did not empower him to throw it away. He therefore says that the father can reclaim the money by means of a *vindicatio*. 3. Only if one supplies money to a son-in-power by way of loan does one contravene the *senatus consultum*, not by making a contract of any other kind, such as a sale or lease or whatever; for it was the provision of cash which was thought to endanger parents. Thus, even if I stipulate for the money owed to me by a son-in-power under a sale or some other contract not involving the transfer of money by me, the *senatus consultum* does not apply, because even supposing there is now a loan, it was not constituted by the handing over of money. It is different if there is a deliberate scheme to get round the *senatus consultum* by having the person who cannot make a valid loan make a sale instead so that the borrower has the price of the thing by way of loan. 4. If I contract with a son-in-power to make him a loan, but do not actually lend him the money until he has become head of a household, whether because his civil status has undergone a change or because his father has died or because he has become independent in some other way without any change in his civil status, the *senatus consultum* does not apply because the borrower was head of a household at the time the loan was made.

4 SCAEVOLA, *Questions, book 2:* People say that one is not allowed to lend to a son-in-power, but they are referring to the payment of the loan rather than to the agreement on it.

5 PAUL, *Questions, book 3:* So here judgment is for the full amount, not just up to the amount of the defendant's assets.

6 SCAEVOLA, *Questions, book 2:* By contrast, if you contract to make a loan to a person who is head of a household and when you actually lend the money he has become a son-in-power, the will of the senate must be followed because it is the payment which completes the substance of the obligation.

7 ULPIAN, *Edict, book 29:* According to Neratius in the first and second books of

his *Replies*, the *senatus consultum* does not apply when a son-in-power guarantees a debt. Celsus in the fourth book agrees. But Julian adds that it is a fraud on the *senatus consultum* if the son-in-power, who had been going to borrow the money himself, puts forward another person as a front and promises to repay anything lent to him; both the son-in-power and the other debtor will have a defense, because relief is afforded to a son's guarantor as well as to himself. 1. He also says that a special defense of fraud arises if, alongside the son-in-power who is to have the money, I take Titius as a principal debtor rather than as a guarantor, simply in order to deprive him of the benefit enjoyed by guarantors under the *senatus consultum*. 2. If a father has been banished or has been absent for a long time and a son-in-power promises a dowry on behalf of a daughter and pledges property of his father's for this purpose, the *senatus consultum* does not apply. The father's property will not be bound, but the son, of course, will be met with a defense of fraud if he seeks to recover the pledge on becoming heir to his father. 3. Should the making of a loan be taken to cover the loan of anything that may be lent, or only the loan of money? The words themselves seem to me to refer to money, since the expression used by the senate is "has lent money." But if a loan of, say, corn or wine or oil is made so that the son-in-power may sell it and use the proceeds, this is a fraud on the *senatus consultum* and he should be given relief. 4. The spirit of the *senatus consultum* applies, and the defense should therefore be allowed, if the son is in the power of one person at the time of the loan and is now in the power of another. 5. The *senatus consultum* must also apply if it is for any reason other than death that the head of the household is no longer in the *civitas*. 6. The action must be denied not only to the person who made the loan but also to his successors. 7. Furthermore, if one party lends the money and another stipulates for its repayment, the defense is good against the latter although he did not furnish the money. Rather harshly, both of them are made to suffer, even if one of them was unaware that the borrower was a son-in-power. The same applies where there are joint creditors. 8. If I accept two debtors, both of whom are sons-in-power although I believe one of them to be head of a household, it is critical which of them receives the money. If the money goes to the one I knew to be a son-in-power, I shall be met with a defense, but not if it goes to the other. 9. The *senatus consultum* applies whether the loan is with interest or without. 10. Although the senate did not make it clear who can raise the defense, we may take it that the defense is available to the heir if the son-in-power became head of a household before he died and to the father if he was still a son-in-power at his death. 11. It sometimes happens that although the *senatus consultum* applies in a certain situation, an action nevertheless lies against a third party. Take the case where a son-in-power borrows money while acting as manager of a business. Julian, in his twelfth book, says that while the manager himself, if sued, has the defense arising from the *senatus consultum*, the person who appointed him is liable to an action based on the manager's conduct. He adds that if the person who appointed the son was the father himself and it was the father's business, or if the father allowed the son to trade with his *peculium*, the *senatus consultum* would not apply at all, since the contract would be taken to have been made with the father's consent. For unless he specifically prohibits his son from doing so, a father who knows that his son is in trade is deemed to have consented to his taking loans. 12. The *senatus consultum* is also inapplicable if the son borrows money and uses it for his father's benefit; the money is then not for himself but for his father. Even if the son originally borrowed the money for some other purpose, Julian says in the twelfth book of his *Digest* that the *senatus consultum* is inapplicable if he eventually used it to swell his father's estate, as he is deemed to have taken it for that purpose from the very beginning. But there is no benefit to the father's estate if the borrowed money is used to pay off the son's debt to the father, and, therefore, unless the father knew of it, the *senatus consultum* will apply. 13. It is said that the *senatus consultum* is inapplicable when a

son-in-power borrows money while he is studying away from home, but this is true only of loans of a moderate amount, certainly not if they exceed the allowance usually made by the father. 14. A son-in-power has no defense under the *senatus consultum* if he borrows money to pay off a person to a suit by whom he would have no answer. 15. Much less does the *senatus consultum* apply if the father has started to pay off a loan made to his son; for he will be treated as having ratified it. 16. If the son becomes head of a household and pays off part of the loan, the *senatus consultum* ceases to apply and he cannot recover what he has paid.

8 PAUL, *Edict, book 30:* Though money paid in ignorance by a curator may be recovered.

9 ULPIAN, *Edict, book 29:* And if, having become head of a household, he gives a pledge, he cannot, up to the value of the pledge, use the *senatus consultum* as a defense. 1. If a son receives a gift of money from a third party and uses it to pay off his lender, can the father vindicate or reclaim the money? Julian said that if the gift of money was conditional on its being used to pay off the lender, the money should be deemed to have been transferred directly from the donor to the lender so as to vest in the latter, but if the gift was unconditional, the son had no power to dispose of it and so, if he has paid it over, the father has at least a *condictio*. 2. This *senatus consultum* applies equally to daughters-in-power, and it is immaterial that the money may have been used for their beautification. For whether the money lent to a son-in-power has been spent or is still in his *peculium*, the lender is barred from suing by the decree of our supreme body. All the more rigorously does the *senatus consultum* strike at a loan made to a daughter-in-power. 3. Relief is given not only to the son-in-power himself and to his father but also to his guarantor and principal, who have recourse against him on the contract of agency, unless they intended to make a gift of their credit when they bound themselves for him. If they have no recourse, the *senatus consultum* does not apply. But if their intervention, though not donative, was known to the father, the entire transaction will be taken to have the father's approval. 4. If payment is made by guarantors for the son without the father's consent, they cannot reclaim what they have paid. This was decided by Hadrian, now deified, so their inability to recover can be asserted. It is true that had they been sued, they would have had a permanent defense, but so would the son himself, and he cannot recover anything he pays, for the reason that the right to reclaim is excluded when immunity from liability is conferred in order to penalize the creditor rather than to relieve the debtor. 5. While they cannot reclaim what they have paid,

10 PAUL, *Edict, book 30:* because a natural obligation subsists,

11 ULPIAN, *Edict, book 29:* yet they may, under the *senatus consultum*, refuse to pay a judgment entered against them in a suit in which they failed to raise it as a defense. Julian said so in the very case of a son-in-power, using the instance of the female guarantor as an analogy.

12 PAUL, *Edict, book 30:* If a father so much as knows that a loan is being made to a son in his power, we must hold that the *senatus consultum* does not apply. Nor does it apply if the father authorized the making of the loan to his son and then changed his mind without the lender's knowledge; for it is the beginning of the contract that counts.

13 GAIUS, *Provincial Edict, book 9:* If a loan has been made to a third party, and a son-in-power, with the intention of replacing that debt, formally promises to repay it, this promise is not, according to Julian, invalidated by the *senatus consultum.*

14 JULIAN, *Digest, book 12:* A son of mine has a son of his own and authorizes the making of a loan to him, my grandson. Has the *senatus consultum* been contravened? The advice is that although the *senatus consultum* refers only to a son, the same rule must apply to a grandson. The father's authorization cannot take the loan out of the *senatus consultum* when the father himself could not borrow without his own father's consent.

15 MARCIAN, *Institutes, book 14:* It is irrelevant whether the son-in-power borrows from a private individual or from a *civitas*; for the Emperors Severus and Antoninus, now deified, gave a written decision that the *senatus consultum* applies to a *civitas* as well.

16 PAUL, *Replies, book 4:* If in the absence of his father a son borrows money, states in the *cautio* that he does so as agent for his father, and then asks his father by letter to pay the money in the provinces, the father, if he wishes to impugn the son's act, must give immediate evidence of his disavowal.

17 PAUL, *Views, book 2:* If a son-in-power borrows money in order to constitute a dowry for his sister, the father is liable to an action for benefit taken; for it is he who can reclaim the dowry if the girl should die during the marriage.

18 VENULEIUS, *Stipulations, book 2:* No guarantee of a loan made to a son-in-power can be taken once the son has died, according to Julian, because there is no longer any civil or natural obligation to which the guarantee could attach. But a guarantee of the father's liability under the action on the *peculium* would be perfectly good.

19 POMPONIUS, *Readings, book 7:* Julian said that the defense under the *senatus consultum Macedonianum* was good only against a lender who knew or had the means of knowing that the borrower was a son-in-power.

20 POMPONIUS, *Senatus Consulta, book 5:* If a person who had borrowed money when he was in the power of his father becomes head of a household and makes a fresh promise to repay that money without realizing the true facts, he will be given a special defense to any action brought on that stipulation.

BOOK FIFTEEN

1

THE *PECULIUM*

ULPIAN, *Edict, book 29:* With regard to contracts effected with people in someone else's power, the praetor chose to attend first to those which give rise to an action for the full amount before proceeding, at this point, to the action on the *peculium.* 1. This section of the edict is in three parts: the action on the *peculium,* the action for benefit taken, and the action on an authorized transaction all stem from it. 2. The words of the edict are as follows: "When a transaction has been entered into with a person in the power of another." 3. Although the edict uses the masculine and not the feminine form of the word "person," an action in respect of women nevertheless lies under the edict. 4. A transaction made with a son-in-power who is *impubes* or with a slave gives rise to an action on the *peculium* against the master or father, if it increases the value of the *peculium.* 5. The word "power" is given its normal meaning and covers both the son-in-power and the slave. 6. Actual power over a slave is just as important as the right of ownership; it is not only for our own slaves and for those which we own in common that we are liable but also for those who are genuinely thought to be our slaves, whether they are in fact free or the slaves of others.

2 POMPONIUS, *Sabinus, book 5:* A person with a usufruct in a slave or a right to his services is liable to the praetorian actions, including the action on the *peculium,* if the transaction is such that acquisitions by the slave would vest in him; otherwise, the action lies against the slave's owner.

3 ULPIAN, *Edict, book 29:* Although the praetor promises an action in respect of contracts with a person who is in the power of another, it is worth noting that an action on the *peculium* may lie even though the contractor is not in anyone's power, such as a slave who forms part of an inheritance which has not yet been taken up. 1. Thus, if a slave is to inherit only if a prior heir or heirs fail to accept, and a contract is made with him while the others are considering whether to accept or not, Labeo says that if they decide not to accept and the slave becomes free and inherits, he may be sued on the *peculium* and for any benefit accruing to him. 2. It is immaterial whether the owner of the slave be male or female, since an action on the *peculium* lies against women as well. 3. Pedius says that even an *impubes* who owns a slave may be liable to an action on the *peculium;* contracts, after all, are not made with the child himself; it is the tutor's authority one looks to. He adds that a *pupillus* has no power to confer a *peculium* on a slave, even with his tutor's authority. 4. The curator of a madman is, in my opinion, liable to an action on the *peculium,* since for a madman's slave to have a *peculium* it is not necessary that it be granted, only that it not be prohibited. 5. Does an action on the *peculium* lie if a son-in-power or slave has helped a third party by going surety for him or giving a guarantee or authorizing someone to pay on his behalf? The true view, as Celsus says in his sixth book when dealing with guarantees given by slaves, is that one must inquire into the slave's reason for giving the guarantee or authorizing the payment. Thus, if the slave becomes a surety as a favor in a matter of no concern to the *peculium,* his master will not be liable to an action on the *pecu-*

lium. 6. In the twelfth book of his *Digest*, Julian writes that it is critical what reason a slave had for asking a third party to pay my creditor. If it was on behalf of a creditor of his own that the slave asked the third party to pay, the master will be liable on the *peculium*, but not if the slave was just doing it as a favor. 7. Consistent with this is Julian's opinion that if I accept a surety offered by my son, anything I receive from him renders me liable to an action of mandate up to the amount of the *peculium* rather than to an action for benefit taken. The same is true of a slave's surety. So, too, if a third party pays me a debt my son owes me; if my son did not owe me anything, the guarantor can use the *exceptio doli* if he is sued, and can bring a *condictio* if he has already paid. 8. If a slave makes an arbitration agreement while he is acting as a free man, does an action on the *peculium* lie for the agreed penalty, if it falls due, as it would for a maritime loan, on the basis that it was done on my business? I agree with Nerva the Younger that on the better view no action on the *peculium* arises from the slave's agreement to arbitrate because he would not, as a slave, be liable even if judgment were entered against him. 9. If a son has given a guarantee or gone surety, is the father liable on the *peculium*? Sabinus and Cassius were right in thinking that the father, unlike the master of a slave, is invariably so liable. 10. It follows that the father will be held liable on an arbitration agreement, too. Papinian noted in the ninth book of his *Questions* that since it is the stipulation on which the father is being sued, it is immaterial whether he would or would not be liable on the issue which gave rise to the arbitration proceedings. 11. He also says that if action is brought on a judgment, the father is liable up to the amount of the *peculium*, and Marcellus agrees that this is so, even if the original suit was not such as to render the father so liable; for a bond with the son is created by judgment just as it is by stipulation. One looks not to the basis of the suit, but to the binding effect, so to speak, of the judgment itself. Where a son defends a third party and judgment goes against him, Marcellus's opinion was the same. 12. A *condictio* in respect of stolen property admittedly lies against a son-in-power, but does it lie against the father or master up to the amount of the *peculium*? The true view is that the master is liable to an action on the *peculium* to the extent he has been enriched by the theft; Labeo approves of this; for it would be quite wrong that the master be enriched by his slave's theft and not be liable. The father will also be liable in an action on the *peculium* to the extent of any gain he receives if his daughter-in-power is guilty of taking her husband's property. 13. If a son-in-power is acting as one of the *duoviri* and omits to obtain a *cautio* that the ward's property be safe, Papinian, in the ninth book of his *Questions*, says that an action on the *peculium* will lie. In my opinion, it is just the same if the son has been appointed *decurio* with his father's consent, since the father is bound to see to the safety of public property.

4 POMPONIUS, *Sabinus, book 7:* A thing does not become part of the *peculium* just because the slave keeps it in a separate account; the master himself must have allocated it to the slave's accounts rather than to his own. It is not the slave's conduct that counts, but the conduct of the master in establishing the slave's *peculium*; for it is he who has the power to increase it or to diminish it or to take it away altogether. 1. If a master wants to release his slave from a debt, I think that the debt is extinguished by the mere intention of the master; but if the master makes entries in his books suggesting that he owes the slave something when, in fact, he owes nothing, I think the opposite is true; any increase to the *peculium* must be effected by acts, not words. 2. It follows that it is what the slave holds with the master's consent which constitutes the *peculium*, not what the slave holds without his master's knowledge; otherwise, a thing which the slave had filched from his master would form part of the *peculium*, and that is not the law. 3. However, a slave's *peculium* can easily diminish without the master's knowledge, as where the slave causes damage to the master or commits theft. 4. If my slave helps you to steal something from me, I can deduct from the *peculium* any shortfall there may be in what I can recover in respect of the stolen property. 5. Even if a slave's indebtedness to his master exceeds the full value of the

peculium, the things in it nevertheless constitute a *peculium*; for if the master made the debt over to the slave or if some third party paid it to the master on the slave's behalf, the *peculium* would revive without any need for a new grant by the master. 6. A thing forms part of an underslave's *peculium* if it is kept separate from the master's accounts or from the accounts of the person to whose *peculium* he belongs.

5 ULPIAN, *Edict, book 29:* If I deposit something with a son or slave, the liability of his father or master is limited to the amount of the *peculium*, plus anything they have got out of me by fraud. 1. But if a person has let a son-in-power or slave have something by way of *precarium*, the liability of the father or master is limited to the amount of the *peculium*. 2. If a son-in-power challenges his opponent to give an oath and the opponent does so, an action on the *peculium* lies just as if there had been a contract; it is otherwise in the case of a slave. 3. A *peculium* is so called because of the picayune nature of the money or property in it. 4. According to Celsus in the sixth book of his *Digest*, Tubero defines a *peculium* as the property which the slave, with his master's permission, keeps in a separate account of his own, less anything owed to the master.

6 CELSUS, *Digest, book 6:* Labeo is wrong to say that Tubero's definition of *peculium* does not cover the *peculia* of underslaves; for by the very act of granting a *peculium* to the slave, the master is deemed to have granted one to the underslave.

7 ULPIAN, *Edict, book 29:* Celsus himself adopts Tubero's view. 1. He adds that while a master who is a *pupillus* or a madman cannot confer a *peculium* on his slave, this does not entail the removal of any *peculium* that has already been conferred by the madman before he went mad or by the father of the *pupillus*. This is quite correct, and it is consistent with Marcellus's observation in a note on Julian that a slave may have a *peculium* in respect of one owner and not in respect of another; the example he gives, namely the case where one of the owners is mad or a *pupillus*, is based on the view (which, as he says, some people accept) that in order for a slave to have a *peculium*, it is not necessary that it should have been granted by the master, though it must not have been taken away. Free administration of the *peculium* is a different matter and must be granted specifically. 2. The master does not have to be aware of every specific item in the *peculium*; a "rough idea" is sufficient, as Pomponius tends to think. 3. Pedius writes in his fifteenth book that even though a son or slave is a *pupillus*, he may have a *peculium*, since, as he points out, it all depends on the master's grant. The slave or son, therefore, will retain their *peculium* if they go mad. 4. The *peculium* can contain property of any kind, both land and movables. It can contain underslaves and their *peculium*. Furthermore, it can contain debts. 5. If proceeds of an action of theft or other suit are owed to the slave, they should be included in the *peculium*; so also, according to Labeo, should any inheritance or bequest. 6. Anything owed by the master to the slave should also be included in the *peculium*, such as expenses incurred by the slave on the master's behalf which the master wishes to meet, or the proceeds of a suit brought by the master against one of the slave's debtors. Thus, unless the master decides otherwise, double damages obtained by the master on the slave's eviction from property purchased by the slave will be allocated to the slave's *peculium*. 7. The *peculium* also includes debts owed by a fellow slave, provided he already has a *peculium* or is about to receive one.

8 PAUL, *Sabinus, book 4:* Property of the master is not *ipso facto* transferred to the *peculium* just because the master wishes this to happen; it must be handed over or, if it is already in the slave's control, be treated as handed over; for things need an actual transfer. On the other hand, a *peculium* ceases to be *peculium* just as soon as the master so wishes.

9 ULPIAN, *Edict, book 29:* The *peculium* gets no credit if the master causes damage to the slave, any more than if he steals something from it. 1. For damage caused or theft committed by a fellow slave the *peculium* would of course receive a credit, as Pomponius said in his eleventh book; for, according to Neratius in the second book of his *Replies*, the *peculium* gets credit for anything the master obtains or can obtain from a person who has stolen from the *peculium*. 2. Everything owed by the slave to the master is deducted before the *peculium* is valued on the supposition that the master has already stepped in and sued the slave. 3. To this definition Servius adds that one must also deduct anything owed to people in the master's power, as this too is admittedly due to the master. 4. The master or father may also deduct debts due to those for whom they are acting as tutor or curator and to those whose affairs they are managing; this does not apply if they themelves are guilty of fraud, since, if they dishonestly suppress or strip the *peculium*, their liability is personal. Given that the master is always deemed to step in and sue, why not deem him, as tutor or manager or the like, to step in and sue himself? As Pedius rather nicely puts it, the reason that debts due to the master or father are deducted from the *peculium* is that the master would hardly allow the slave to keep in his *peculium* what the master was entitled to claim. Seeing that in other cases we treat a tutor or person who has managed another person's affairs as having collected sums due from himself, why not take the master to have claimed what he should have claimed when the case involves a *peculium*? So in an action on the *peculium*, it is defensible to let the master pay himself, so to speak, what he owes himself. 5. If a creditor of the slave becomes heir to the master and is sued on the *peculium*, he can deduct what he is owed, regardless of whether or not the slave has been freed or unconditionally bequeathed; the assumption that he steps in and sues himself allows the creditor to deduct what is due even although he never owned the slave now manumitted or bequeathed. This is what Julian says in his twelfth book, although he is certainly more confident about the heir's right to deduct when the grant of freedom is only conditional; for, then, he becomes owner of the slave. Julian supports his opinion by adducing the consideration that if I become heir to a person whose liability to an action on the *peculium* is still running because his slave or son had died less than a year previously, I can certainly deduct what is owed to me. 6. The master may deduct what is due to him by contract or on account, but he may equally deduct what is owed to him for a delict, such as theft. But should one deduct only the cost of the theft, that is, the master's out-of-pocket loss, or the amount he could obtain, including penalties, if someone else's slave had been implicated? The former is the sounder opinion; only the actual cost of the theft is deductible. 7. The damage arising when a slave wounds himself is not a deductible item, any more than if he had committed suicide or thrown himself over a cliff; for slaves are naturally allowed to do themselves an injury. But if a slave with self-inflicted wounds is cared for by the master, I think the slave must pay the master what it costs, although it is true that a master who cares for a slave who has fallen ill is treated as looking after his own interests in the main. 8. A deduction from the *peculium* may likewise be made for any liability that the master has incurred or discharged on account of the slave. Thus, in the twelfth book of his *Digest*, Julian says that a deduction may be made for money lent to the slave on the master's authorization, although in my view there should not be a deduction but rather a set-off, if the payment enured to the benefit of the master. In the same place, Julian says that a deduction may be made if the master stands guarantor for his slave; but Marcellus says that if the master is not yet out of pocket, it is better in both cases for him to pay the creditor rather than make a deduction at the outset and to take a *cautio* from him that he will refund the money in the event that

the master has to pay out on the guarantee; in this way, the creditor will have the use of the money in the meanwhile. But a master, or father, who has been held liable on the *peculium* and is sued again can make a deduction in view of his liability under the judgment; anything actually paid to the creditor on the slave's behalf can be deducted even if there has been no judgment.

10 GAIUS, *Provincial Edict, book 9:* If judgment is rendered in an action on the *peculium* while an earlier action is still pending, no account whatever should be taken of the earlier action, because it is the first comer who is favored in an action on the *peculium*, and the first comer is not the person who first joins suit but the person who first obtains judgment.

11 ULPIAN, *Edict, book 29:* If a noxal action is brought against the master and he pays monetary damages, this can be deducted from the *peculium*, but nothing can be deducted if he makes a noxal surrender. 1. If the master makes a formal promise to pay in lieu of his slave, he can make a deduction, just as he can if the slave takes upon himself the liability of one of the master's debtors. So, too, the slave becomes a kind of debtor to his master if he takes over such a liability in return for his freedom, but the deduction can only be made if the manumission has been effected when the suit is brought. 2. If a slave collects payment from one of his master's debtors, does he himself thereby become a debtor of his master? In the twelfth book of his *Digest*, Julian says that only if the master ratifies the collection, can he make a deduction and that this is so in the case of a son-in-power as well. I think Julian is right; in making deductions from the *peculium*, we look to what is due naturally, and it is naturally fair that the son or slave be relieved of liability when it is obvious that what he collected was not due. 3. If a master is sued twice, may he deduct in the second suit what he deducted in the first, or is a deduction once made tantamount to a discharge? As Julian notes in his twelfth book, Neratius and Nerva think that no further deduction is allowed if the master physically removed an asset from the *peculium*, but that if he left the *peculium* as it was, he is entitled to deduct. 4. Finally, Julian says that if a slave who owes five to his master has in his *peculium* an underslave worth five and the master deducts this underslave, it is not as if the underslave were now at the master's risk. If the underslave dies and the slave buys a substitute of equal value, the slave remains in debt to the master; it would be different if before the underslave's death the master had taken him away from the slave as payment to himself. 5. He also says, quite rightly, that if a master is owed five by a slave whose *peculium* contains an underslave worth ten, and the master pays five when sued on the *peculium*, the death of the underslave will not prevent his deducting ten in a subsequent suit on the *peculium*, since the slave is now indebted for the five which the master has paid. This only ceases to be so if the master takes the underslave away from the slave by way of payment to himself. 6. When we say that the person sued on the *peculium* may deduct what is owed to him, this is subject to his inability to obtain satisfaction from any other source. 7. Finally, Julian says that if a person sells a slave complete with *peculium* he cannot, if sued on the *peculium*, deduct what is owed to him by it; for he could have made the deduction when valuing the *peculium* for sale; indeed, since what is owed to the master forms no part of the *peculium*, he can now bring a *condictio* to recover that amount on the ground that he was not bound to transfer it. He can also bring an action on the sale. Provided that at the time of the sale there was enough in the *peculium* to satisfy the debt owed to the master, this view is acceptable, but not if the debt which the master failed to deduct has subsequently become in any respect more onerous. 8. Julian also asks whether a person who buys a slave in respect of whom he has an action on the *peculium* may deduct what is owed to him, seeing that he can sue the seller on the *peculium*. Julian says that he may make the deduction; after all, third parties can choose whether to sue the buyer or the seller, and here the buyer is just

choosing to deduct rather than sue. This is correct, and I cannot see how the creditors can complain, since they themselves can sue the seller if they think the *peculium* is worth anything. 9. In addition to what is due to himself, the defendant may deduct what is due to his partner, as Julian says in the twelfth book of his *Digest*; for just as either may be sued for the full amount, so each may deduct what is owed to the other. This is the received opinion

12 JULIAN, *Digest, book 12:* because in this case suit can also be brought against a person who does not have the *peculium.*

13 ULPIAN, *Edict, book 29:* But this is not so in the case of persons other than partners, such as purchaser and vendor, or usufructuary and owner, or owner and bona fide purchaser; as Julian himself writes in the twelfth book, none of these can deduct what is owed to the other.

14 JULIAN, *Digest, book 12:* Thus, if a will requires the immediate manumission of a slave, action on the *peculium* must be brought against the heirs individually, and none can deduct more than is owed to himself. 1. Likewise, if more than one heir succeeds to a master whose slave has predeceased him by less than a year, the action on the *peculium* and the right of deduction are divided.

15 ULPIAN, *Edict, book 29:* If there are two bona fide possessors, we must still say that neither can deduct more than is owed to himself; so, too, if there are two usufructuaries and there is no partnership between them. Even of partners the same may be true if each keeps his *peculium* separate; for then neither can be sued on the other's *peculium.* But if the *peculium* is held in common, an action will lie for the full amount, and deduction may be made of what is owed to the other.

16 JULIAN, *Digest, book 12:* When may the *peculium* of a slave who is jointly owned appertain to only one of the owners? This may arise when a person sells a half share in a slave and grants no *peculium* with it. It also arises when, with the intention of retaining ownership, a person gives money or other property to a common slave for purposes of administration only. MARCELLUS notes: A further case arises when one of the owners withdraws his *peculium* or when the *peculium* admittedly granted by the master consists exclusively of debts due to him.

17 ULPIAN, *Edict, book 29:* If a slave of mine has underslaves, can I deduct from his *peculium* what they owe me? One must first ask whether the *peculia* of underslaves are reckoned in the *peculium* of the principal slave; according to Proculus and Atilicinus, the *peculia* of underslaves must form part of his *peculium* as they themselves do. Thus, debts due to me from their master, the principal slave, may be deducted from their *peculia* as well as from his; debts due from the underslaves themselves may be deducted from their *peculia* alone; debts from them to the principal slave rather than to me may be deducted from their *peculia,* like debts due to a fellow slave; but debts due to them from the principal slave will not, according to Servius, be deductible from his *peculium,* since his *peculium* includes theirs, although in my view their *peculium* will be increased just as happens when a master owes something to his slave.

18 PAUL, *Questions, book 4:* It follows that if Stichus's *peculium* is bequeathed to him and he sues for it by an action on the will, he need only give credit for any debt owed to the testator by his underslave if the underslave himself has a *peculium.*

19 ULPIAN, *Edict, book 29:* The next question is whether a person who has brought an action on the *peculium* in respect of the principal slave may then sue in respect of underslaves. I think not. But one may sue on the *peculium* of the principal slave after

bringing an action on the *peculium* of an underslave. 1. A *peculium* in my control may well have two aspects in law. Suppose that I have been given a dowry which includes a slave. That slave may have a *peculium* as to my wife, and he may have a *peculium* as to me as well, since the master is entitled to whatever such a slave makes with his master's property or by his own efforts; thus, according to Pomponius, the husband does not have to account for inheritances or legacies left to the slave in order to honor the husband. Now suppose that I am sued on a contract arising out of my own affairs. May I deduct all the debts due to me, even if they arise out of my wife's affairs, or must we act as if there were two separate *peculia* and distinguish according to the origin of each debt, deducting what is due from my wife's *peculium*, if the transaction in suit concerns her, but deducting only my own if the transaction relates to me? The clearest discussion of the question whether a person is liable to an action on the *peculium* only on contracts appertaining to him or on other contracts as well has turned on the case of the usufructuary. Marcellus says that the usufructuary should be liable on all the slave's contracts; for contractors look to the slave's *peculium* as a whole, just as they would look to all the assets of a freeman. At the very least, he says, the party not benefited must be liable for the unpaid balance after suit has been brought against the party at interest. This is the better view, and Papinian accepts it. The same must apply where there are two bona fide purchasers. But in the case of the husband, it is better to say simply that he is liable on the *peculium*. Suppose, however, that he is sued by his wife on the dowry. Can he deduct what he has paid out on behalf of the slave? He says that a pro rata deduction should be made from each *peculium*, if the payment made to the creditor related to them both; and it can be inferred from this that if the contract appertains to only one of the *peculia*, the wife's *peculium* should sometimes suffer a deduction in full and sometimes none at all, as when the contract relates to the husband. 2. Sometimes the usufructuary himself may have an action on the *peculium* against the owner, as in the case where the owner's *peculium* is solvent and the usufructuary's is either worthless or worth less than is owed to him. Sometimes it happens the other way round. As between two owners, however, the need will be met by an action on the partnership or an action for the division of common property.

20 PAUL, *Edict, book 30:* For an action on the *peculium* does not lie between partners.

21 ULPIAN, *Edict, book 29:* The praetor was perfectly right to deem the *peculium* to contain the assets it would still possess but for the master's fraud. We must take it as fraud if the master suppresses the *peculium*; and Mela says that it is fraud if he allows the *peculium* to become so involved that creditors are disadvantaged. It is fraud to divert the *peculium* to a third party in view of an impending lawsuit; but there is nothing wrong with making payment to a creditor, since creditors are allowed to see to it that they get their due. 1. If a tutor or curator or agent is guilty of fraud, does a suit on the *peculium* lie against the *pupillus*, madman, or principal? In my opinion, and as Pomponius wrote in the eighth book of his *Letters*, the *pupillus* must pay for the tutor's fraud if the tutor is solvent, especially if the *pupillus* was the gainer by it; the same applies to curators and agents. 2. But the purchaser is not liable for the fraud of the vendor, nor is the heir or other successor liable beyond any gain they may receive. The judge may take account of any fraud, whether or not the action had been joined when it was committed. 3. The master or father cannot refuse to defend an action on the *peculium*, but are compellable to undertake the defense in this as in any other personal action.

22 POMPONIUS, *Sabinus, book 7:* Account must be taken of any promise made by the master to cover damage caused by ruinous buildings belonging to the *peculium*, and similar security must be given by anyone who sues the master on the *peculium*.

23 POMPONIUS, *Sabinus, book 9:* Promises to cover future damage done by buildings belonging to the *peculium* must be for the full amount, just like judgments in noxal actions triggered by underslaves, because if these suits are undefended, the plaintiff may remove the property or take it into possession by way of security.

24 ULPIAN, *Sabinus, book 26:* The curator of a madman has the power to grant or refuse to grant the administration of the *peculium* to the madman's slave or son.

25 POMPONIUS, *Sabinus, book 23:* Clothes form part of the *peculium* if the master gives them to the slave for his exclusive and permanent use, but not if they are to be used only for particular purposes or on special occasions, such as attending him as footman or waiting upon him at dinner.

26 PAUL, *Edict, book 30:* Once the master who has been sued on the *peculium* has paid up on the ground that he had acted fraudulently, he is free from liability on that ground in subsequent suits. And he should not be held liable at all if the slave's debts to him equal the amount by which he depleted the *peculium*. It follows that even if he manumits or alienates the slave, he remains liable for his fraud for a year thereafter.

27 GAIUS, *Provincial Edict, book 9:* An action on the *peculium* lies in respect of slave-girls and daughters-in-power, especially if they ply some common trade such as sewing or weaving. Actions of deposit or loan lie on their account, as Julian says. So, too, does an action for distribution if the father or master knew that they were trading with the capital in their *peculium*. A fortiori, an action lies if the father or master authorized the transaction or benefited from it. 1. It is agreed that if an action on the *peculium* is brought against the master's heir, he may make a deduction in respect of any property of the estate which the slave had removed or consumed or damaged before the heir's entry into the inheritance. 2. Although a praetorian action on the *peculium* lies against the transferor of a slave for a year after the transfer, the new master may also be sued regardless of whether the present *peculium* is a new one acquired under the transferee or the old one reconferred on the slave after forming part of the sale or gift. 3. Julian approves of the accepted rule that where the vendor has several heirs the creditor may sue each of them for his part or any of them for the whole. 4. But he does not think the vendor should be allowed to sue the purchaser on the *peculium* for money he lent to the slave before selling him. 5. Nor does he think that I should have an action against the purchaser if I buy a slave to whom I have previously lent money and then sell him again. 6. But he accepts that for a year starting with my purchase, I should be able to sue the vendor for a loan I made to the slave before he became mine less any *peculium* the slave may now have with me. 7. Consistently with his view that if I myself lend money to a slave of mine, I cannot sue the man who buys him from me, Julian thinks that I cannot sue if the loan is made to him by another slave of mine. 8. A person who contracts with a slave belonging to two or more owners may bring an action in full against any of the owners he likes; for it would be wrong that a person who dealt with a single contractor should have to divide his claim between several defendants. In a suit against the chosen defendant, account must be taken not

only of the *peculium* held by him but also of that held by the other owners. Nor will the defendant be harmed by being held liable, because if he pays more than his portion, he may recover the balance from his partner or partners by suing on the partnership or bringing a divisory action. Julian says that this is correct if the other owners hold a *peculium* because their partner is then freeing them from a debt by making the payment, but not if they have no *peculium*; for then there is no debt from which they could be thought to be being freed.

28 JULIAN, *Digest, book 12:* Thus, a defendant whose partner has died without heir or *bonorum possessor* should only be held liable to the extent of the *peculium* he holds plus such amount as he can obtain from the estate.

29 GAIUS, *Provincial Edict, book 9:* If people who have now become heirs had contracted with a slave who has now been freed on the testator's instructions, they may sue each other on the *peculium*, because everyone who has any *peculium* is liable on it regardless of who is suing. 1. Even a master who forbade people to deal with his slave is liable to an action on the *peculium*.

30 ULPIAN, *Edict, book 29:* Suppose that the *peculium* is empty when an action on it is instituted, but has some assets when the time comes for judgment. Does the action succeed? Proculus and Pegasus think that the action is maintainable in these circumstances; for the *intentio* remains true though the *peculium* be empty. The same view has been held of the action for production and the action *in rem*, and I approve of it. 1. If action is brought against a partial heir of the master or father, liability should be limited to the *peculium* which that defendant himself holds; and in an action for benefit taken, he should be held liable only for his part, unless the benefit accrued to him personally. Such an heir cannot be sued as if he were one of a partnership; he is liable only for his part. 2. If the slave himself has been made partial heir, the action against him will be similar. 3. But a son may be sued for the full amount, however small the part for which he becomes heir. There can be no objection to his purchasing the debt of another partial heir, if he wishes; for the son could surely seek from a co-heir any benefit which might have accrued to the father's estate; and the same applies if there are funds in the *peculium*. 4. A person who has already brought an action on the *peculium* may bring a further action for the remainder of the debt if the *peculium* has increased. 5. If the creditor's action against the vendor is defeated by the plea of one year's prescription, he should be allowed to sue the purchaser, but if he loses his suit against the vendor because of some other defense, his claim against the purchaser should be reduced by what he could otherwise have obtained from the vendor. 6. Timing may be relevant when fraud is being put forward; it may be that the praetor will not allow fraud to be alleged once the time for the action of fraud has elapsed, because the action for fraud itself cannot be brought after the fixed time. 7. In an action against the heir, the clause in the formula relating to fraud must be limited to what he obtained and no more.

31 PAUL, *Edict, book 30:* But if the heir himself has been fraudulent, he is liable in full.

32 ULPIAN, *Disputations, book 2:* If two or more heirs succeed to a person who was still liable because less than a year had elapsed since the manumission, freeing on instructions, transfer, or death of his slave, suit against one of the heirs will release them all, despite the fact that the defendant is liable only up to the amount of the *peculium* which he personally holds. Julian said so in writing. It is the same if the benefit accrued to one of the others. If there are several usufructuaries or possessors in good faith, suit against one releases the others despite the fact that he is liable only for the *peculium* he himself holds. But while this may be the result at law, equity

demands that an action should lie against persons released by such a legal accident; so they are now freed not by action, but only by satisfaction. For people who deal with a slave have an eye to the whole of his *peculium*, wherever it is, just as they would look to all the assets of a free man. 1. In this action, even if it is a repeat of a previous one, account must be taken of increases and decreases in the *peculium*; for what counts is the current status of the *peculium*, emptied or replenished as it may be. So in the case of vendor and purchaser, the true view seems to be that we can obtain from the purchaser any increase there may have been to the *peculium*, the suit against him not being backdated, as if it were all one action, to the time when the vendor was sued. 2. The vendor who sells the *peculium* along with the slave and hands it over cannot be sued on the *peculium* even within the year; for as Neratius says, the price of a slave is not *peculium*.

33 JAVOLENUS, *From Cassius, book 12:* But if the slave is sold on the terms that the price is to take the place of the *peculium*, the *peculium* may be treated as being in the hands of the person who receives that price

34 POMPONIUS, *Readings, book 12:* rather than the person who has the items which constituted the *peculium*.

35 JAVOLENUS, *From Cassius, book 12:* But the heir is not treated as having the *peculium* when, pursuant to instructions, he had handed it over against a certain sum of money.

36 ULPIAN, *Disputations, book 2:* With regard to bona fide contracts, the question has been raised whether the father or master should be held liable for the full amount or only up to the value of the *peculium*; similarly when a dowry has been given to a son, it has been debated whether the father's liability in an action on the dowry should be limited to the amount of the *peculium*. I think that the action lies not only on the *peculium* but also for anything extra which the woman has been tricked and cheated out of by the fraud of the father; for it is only fair that he should be held liable for the value of property he retains and is not prepared to restore. According to Pomponius, the holding in the case of a slave with whom property has been pawned should be extended to the other good faith contracts; for if a thing has been pawned with a slave, the action on the *peculium* and for benefit taken is extended to include "anything which the plaintiff has been tricked and cheated out of by the fraud of the master." And the master who refuses to restore a thing when he could is regarded as acting fraudulently.

37 JULIAN, *Digest, book 12:* If you sell the inheritance to which you have been instituted by one of your son's creditors, the clause whereby you promise to deliver "whatever money you obtain from the inheritance" will render you liable to an action on the *peculium*. 1. You permit your slave to buy an underslave for eight aurei; he buys one for ten, and tells you that the price was only eight; you allow him to pay those eight from your money and he pays ten. In these circumstances, you can vindicate only two aurei, and for those two the vendor will have a claim on the *peculium*, if it be solvent. 2. If I sell Sempronius a slave owned in common by Titius and myself and an action on the *peculium* is brought against Titius or Sempronius, should account be taken of any *peculium* I may hold? Reply: In an action against Sempronius, no account

whatever should be taken of the *peculium* I hold, because he has no recourse against me for anything he pays. If an action is brought against Titius more than a year after I made the sale, any *peculium* I hold, must likewise be kept out of account, because he can no longer sue me on the *peculium*. However, if that action is brought within the year, then such *peculium* must be taken into account now that it is agreed that on the transfer of a slave, the creditor can sue both the vendor and the purchaser. 3. If an action on the *peculium* is brought against a person who has a usufruct in a slave and the claimant does not obtain the full amount, it is not unfair to let him collect from the whole of the slave's *peculium*, whether it be with the usufructuary or with the owner. It is irrelevant whether the slave hired his own services from the usufructuary or borrowed money from him. So an action must be given against the owner of the slave less the amount of the slave's peculium in the usufructuary's hands.

38 AFRICANUS, *Questions, book 8:* If I deposit ten with a son-in-power and sue for them on the *peculium*, then, even although the son owes the father nothing and still has the ten in his possession, the father, it is thought, should not be held liable, unless there is other property in the *peculium*; for the money remains mine and does not become part of the *peculium*. Certainly, if suit were brought on the *peculium* by the other claimants, it would not be taken into account. So I should bring an action for production, and vindicate the money when it is produced. 1. A woman who promised a certain sum of money by way of dowry at a time when she was engaged to a son-in-power sues the father on the dowry after the marriage has ended in divorce; should she be freed from her promise in its entirety or only subject to a deduction of what the son owes the father? The reply given was that she should be freed from the whole promise, since if she were sued on it she could obviously raise the defense of fraud. 2. An action on the *peculium* was brought in respect of Stichus whose *peculium* included Pamphilus, who was worth ten and owed his master five; it was decided that the whole value of Pamphilus should be taken into account without deduction of his debt to the master; for no one can be treated as forming part of his own *peculium*. In this case, the master suffers a loss, just as he does if he lends money to one of his other slaves who has no *peculium*. That this is so becomes clearer, he says, if one takes the case that Stichus's *peculium* is left to him by way of legacy; if Stichus brings an action for it under the will, debts owed by the underslave can only be deducted from the underslave's own *peculium*. If it were otherwise, and the underslave's debts to the master equaled the value of the *peculium*, Stichus would end up with no *peculium* at all, which is clearly absurd. 3. If I lend money to a slave I have previously sold to you, is my action on the *peculium* against you subject to a deduction of any *peculium* I still hold? Certainly not; nor does it matter whether or not my suit is brought within a year after I sold you the slave; for I am not answerable to third parties who had dealings with the slave after the sale. Contrariwise, if I am sued by people who dealt with

the slave before I sold him, I shall not be able to deduct debts from him to me which only arose thereafter. It appears from this that any *peculium* I retain has no adverse effect on subsequent contracts.

39 FLORENTINUS, *Institutes, book 11:* A *peculium* is made up of anything a slave has been able to save by his own economies or has been given by a third party in return for meritorious services or has been allowed by his master to keep as his own.

40 MARCIAN, *Rules, book 5:* A *peculium* is born, grows, wastes away, and dies. So it was quite elegant of Papirius Fronto to liken the *peculium* to the slave. 1. How is a *peculium* born? Here the older lawyers drew a distinction. They said that things which the master was not bound to provide became part of the *peculium*, but that clothes or other things which the master had to provide did not. So this is how the *peculium* is born; it grows by being increased, it wastes away when underslaves die or property gets lost, and it dies when it is taken away.

41 ULPIAN, *Sabinus, book 43:* A slave cannot really owe or be owed anything, but we use the word loosely to indicate the facts rather than with reference to obligations at civil law. Thus, a master may sue third parties for what they owe the slave, and he may be sued for what the slave owes them up to the amount of the *peculium* and for any benefit thereby accruing to him.

42 ULPIAN, *Edict, book 12:* Although Sabinus and Cassius thought that no action on the *peculium* should lie in respect of dealings prior to adrogation, others have been of opinion that the adrogator is liable to an action on the *peculium*, and I agree with them.

43 PAUL, *Edict, book 30:* Labeo says that if I sue you on the *peculium* and you sell the slave before judgment is rendered, your liability extends to the *peculium* he acquires in the purchaser's ownership and that you deserve no relief since it was your own fault you sold the slave.

44 ULPIAN, *Edict, book 63:* The person who deals with a son-in-power acquires two debtors, the son being liable in full and the father up to the amount of the *peculium*.

45 PAUL, *Edict, book 61:* Thus the creditor can still sue the son even if the father has taken away his *peculium*.

46 PAUL, *Edict, book 60:* One who grants administration of the *peculium* is taken to give general permission for everything that he would have permitted specifically.

47 PAUL, *Plautius, book 4:* The master who displays a notice in a shop saying, "I forbid transactions to be made with my slave Januarius," procures immunity only from the action on the manager's conduct, not from the action on the *peculium*. 1. Sabinus advised that the master should only be liable to an action on the *peculium* in respect of a guarantee given by his slave if the guarantee was given on the master's business or on that of the *peculium*. 2. Once an action has been brought on the *peculium*, there is no case for requiring a *cautio* in respect of future acquisitions of the *peculium*, even if at the time of judgment the *peculium* cannot meet the debt; such a procedure is appropriate in a partnership suit because a partner is liable for the whole amount. 3. Proculus says that the creditor of a slave who has obtained part of his entitlement from the purchaser may bring an *actio utilis* against the vendor for the rest, but that he may not divide his action at the outset and sue the vendor and purchaser simultaneously; it is quite enough for a person who has obtained too little from his chosen defendant to be allowed to have the prior judgment ignored and to bring suit against the other party. This is the law we apply. 4. In Julian's view, it is not just general creditors who may sue the vendor on prior dealings, but also the purchaser, although he himself, if sued by any other creditor, can make deductions, provided that he takes account of any *peculium* in his hands. 5. The vendor who sells a slave and reserves

the *peculium* may still take his deductions in respect of debts arising before the sale, but fresh debts incurred by the slave to the vendor after the sale do not diminish the *peculium* since they are not debts owed to the master. 6. What we have said in respect of buyer and seller applies when the transfer is made on other grounds, too, such as legacy or dowry; the *peculium* of a slave, regardless of its location, is treated like the estate of a free man.

48 PAUL, *Plautius, book 17:* But free administration of a *peculium* comes to an end on flight, theft, or uncertainty as to the slave's survival. 1. A person who has been allowed to administer his *peculium* may arrange for his debtor to pay his creditor.

49 POMPONIUS, *Quintus Mucius, book 4:* A *peculium* consists not only of what the master has allowed the slave to have but also of what the slave has acquired without the master's knowledge, provided that the master would have allowed it to stay in the *peculium* if he had known of it. 1. A slave of mine who has been managing my affairs without my knowledge is to be treated as my debtor to the same extent as a freeman who manages my affairs without my authorization. 2. Before a slave can be treated as his master's debtor or vice versa, there must be a legal basis for the debt; thus, the master does not become a debtor by a mere entry in his book that he owes the slave some money when in fact he never borrowed it or became indebted in any other way.

50 PAPINIAN, *Questions, book 9:* If a father goes to ground at a time when there is nothing in the *peculium*, I cannot be put in possession of his property in order to safeguard my interests in a forthcoming suit against him on the *peculium*, since it is not fraudulent for a person to go to ground when he would be entitled to judgment if he allowed the lawsuit to proceed. Nor is it relevant that there might in fact be judgment against him; the fact that he might wrongly be held liable in a debt suit does not make it fraudulent for a debtor to go to ground while his debt is still conditional or not yet due. But Julian thinks that a guarantor can be held liable on a guarantee given when the peculium is empty, because guarantees of future claims are perfectly valid if they are accepted as such. 1. If a father becomes heir to a creditor who was in the process of suing him on the *peculium*, the *peculium* is valued as of the time of the creditor's death, that being the relevant moment for the *lex Falcidia*. 2. A surety for a slave can be accepted even after suit on the *peculium* has been joined with the master; the fact that the obligation which the slave incurs is a natural one and is not merged in the action explains not only why the guarantee is valid but also why a slave who has paid money after joining issue can no more recover it than if he had paid it before doing so. 3. A slave whom I thought to be mine borrowed money from Titius and gave it to me in return for his freedom. I effected a manumission, but in fact he belonged to someone else. The lender was in doubt whom to sue on the *peculium*. Advice: Although in other cases the creditor has a choice, yet on these facts he must sue the true owner, who can bring an action of production against me for the money; for the money vested in him and was not transferred in the transaction which was supposed to free the slave. Some people think that if I failed to make the manumission the money would belong to the master, but that if I made the manumission the money would vest in me as the proceeds of a transaction of mine; but the distinction is unacceptable, because the money was not so much the proceeds of the transaction as its cause.

51 SCAEVOLA, *Questions, book 2:* If debts are owed to the slave by strangers and the master is sued on the *peculium,* he should not be held liable for the precise amount of the debts, since it may be expensive for him to claim them and unproductive to execute on them, quite apart from the time allowed to judgment debtors for payment and the time it takes to sell up their goods, if it should come to that. So the master should be discharged if he is prepared to cede his actions. The same is true if the defendant is ready to cede his actions where suit has been brought against one of several partners and, because he can sue the others, the *peculium* is valued as a whole. Thus, in all cases where people are held liable on the ground that they have a recourse claim, the transfer of that claim will be treated as good performance.

52 PAUL, *Questions, book 4:* The following questions arose in a case where a person, who was supposedly free and had been acting as a tutor, was declared to be a slave: Could the master, when sued by the *pupillus,* deduct what the *peculium* owed him, given that by rescript the *pupillus* has a stronger claim than other creditors? If deduction is thought to be possible, does it make any difference whether the debt was incurred during or after the supposed freedom of the slave? Can an *impubes* bring an action on the *peculium*? My reply was that no privilege primes a father or master who is being sued on the *peculium* on account of a son or slave. Privileges must of course be upheld as between creditors; after all, a son-in-power might accept a dowry or act as tutor. So the rescript properly applies to the slave who acted as tutor, and since this is an action where the first claimant wins, the claims of other creditors should be postponed. Clearly, if the slave used the money of a *pupillus* to make loans or deposits in strongboxes, the *pupillus* can vindicate the coins and bring an *actio utilis* against borrowers who have spent them. For the slave had no power to alienate them; nor, indeed, has any other tutor. Whether the debt to the master arose when the slave was at liberty or afterward is in my opinion immaterial; for if I lend money to the slave of Titius and then become his owner, I can deduct my prior loans when sued on the *peculium.* So what is the outcome here? Since there is no *peculium* on which to found an action, an *actio utilis* based on the apparent tutorship should be brought against the master, and the assets which the slave was treating as his own should be deemed to constitute his *peculium.* 1. If a son-in-power accepts a dowry or acts as tutor, the ensuing privileges must be respected in an action on the *peculium* either by postponing the claims of general creditors in the meanwhile or by requiring plaintiffs who have no privilege to give a *cautio* that they will restore what they receive, should a privileged creditor come along and sue the father.

53 PAUL, *Questions, book 11:* If a slave is manumitted and the *peculium* is not taken away from him, it is treated as granted to him. But rights of action will need to be ceded to him before he can sue his debtors.

54 SCAEVOLA, *Replies, book 1:* To a son who was also one of his heirs, a testator gave a prelegacy of farms in running order, complete with slaves who owed their master money. The question was whether the other heirs could sue him on the *peculium.* The reply was that they could not.

55 NERATIUS, *Replies, book 1:* If you kidnap a person I am suing on the *peculium,* the *peculium* will be quantified as of the time of the kidnapping.

56 PAUL, *Neratius, book 2:* If my slave promises to take over my debtor's liability to

me, I can deduct the amount of the debt from the *peculium* without losing my claim against the original debtor. But should the *peculium* not be credited with the debt of the person whose liability is so assumed? PAUL: If the master elects to make the deduction when sued on the *peculium*, that will vest the debt in the *peculium*.

57 TRYPHONINUS, *Disputations, book 8:* If the son or slave dies during the course of a suit on the *peculium*, the *peculium* is valued as of the time of their death. 1. But if a person frees his slave by will and leaves him his *peculium* as a legacy, Julian says that the legacy covers the *peculium* as it is at the time liberty is conferred; thus the person manumitted obtains any increases which accrue in any way before the inheritance is taken up. 2. If a person bequeathes his slave's *peculium* to a stranger, one must inquire into the supposed intention of the testator; probably the bequest was to be of the *peculium* as it was at the time of the testator's death, so that the legatee will be entitled to the proceeds of property in the *peculium*, such as the offspring of slave-girls or cattle, which accrue before entry on the inheritance, but not to property which has been given to the slave or acquired by his own efforts.

58 SCAEVOLA, *Digest, book 5:* A testator bequeathed to one of his heirs some farms which were in running order, equipped with slaves and other property and all accessories; the slaves owed money to the master from their periodic accounts and on other grounds. The question was whether the other heirs could bring an action against the legatee in respect of the money owed by these slaves. The reply was that they could not.

2

THE ACTION ON THE *PECULIUM* WHICH PRESCRIBES IN ONE YEAR

1 ULPIAN, *Edict, book 29:* The praetor's edict runs thus: "For one year, starting from the moment after the death, emancipation, manumission, or alienation of a person who was in the power of another when the matter could first have been litigated, I shall give an action limited to what is in the *peculium* or would have been in the *peculium* but for the fraud of the person with power." 1. As long as the slave or son remains in power, there is no time limit on the action on the *peculium*, but it becomes subject to a time limit, the period being one year, on his death, emancipation, manumission, or alienation. 2. The year is calculated functionally, so Julian says that if the obligation is conditional, the year is to be reckoned not from the time of the emancipation, but from the time when the condition is satisfied and suit can be brought. 3. The praetor was right to apply a time limit to the action in this case; for on the death or alienation the *peculium* ceases to exist, and to keep the liability alive for a further year was quite sufficient. 4. Alienation and manumission apply to slaves and not to sons-in-power, death applies to both, and emancipation only to sons. But even if it is otherwise than by emancipation that a son ceases to be in his father's power, the action still lasts only a year. If the son becomes independent because his father dies or is deported, the action lies against the father's heir or the imperial treasury for one year only. 5. Alienation includes sale, so the seller is liable to an action on the *peculium* for a year, 6. as is the person who gives the slave away as a gift or gives him in exchange or as a dowry, 7. and also the heir of a testator who makes a bequest of the slave without his *peculium*. There has been some doubt in the case where the testator makes a bequest of the slave complete with his *peculium* or leaves instructions for him to be freed with it; in my view, the better opinion is that no action on the *peculium* lies against the person manumitted, nor against the legatee of the *peculium*. But is the heir then to be held liable? Caecilius says that he is liable because a person who transfers a *peculium* pursuant to obligation is held to retain it; but Pegasus says that since

the creditors will apply to the heir, he should obtain a *cautio* from the legatee of the *peculium* and that he may be sued if he transfers the *peculium* without doing so. 8. As Marcellus says in his treatise, an heir who is required to hand on the whole estate less the slave and his *peculium* cannot use the *senatus consultum Trebellianum* as a defense to a suit on the *peculium*, and the person to whom the estate is handed on is not liable, as Scaevola notes, since he does not have the *peculium* and is not to be blamed for not having it. 9. Pomponius, in his sixty-first book, says that an action lies against the usufructuary for a year after the usufruct has come to an end. 10. Labeo raises the following question. You have brought an action in the erroneous belief that the son was dead, and have been defeated by the defense that more than a year had elapsed; can you bring another action if you now discover that the son is still alive? His answer is that another action on the *peculium* will lie but not a claim for any benefit received by the father; the latter claim was quite properly brought, because unlike the claim on the *peculium* it is not subject to the time limit of a year.

2 PAUL, *Edict, book 30:* Since the action against the father, which is subject to no time limit while the son-in-power is alive, prescribes in one year after his death, a redhibitory action which may be brought on the *peculium* will prescribe in six months after the son's death. The same principle applies in all actions subject to a time limit. 1. If the slave to whom money has been lent has been captured by the enemy, the year does not start to run on the action on the *peculium* until he can no longer return with *postliminium*.

3 POMPONIUS, *Quintus Mucius, book 4:* When a slave ceases to exist as such and the praetor gives an action on the *peculium* for a year thereafter, we sometimes use the idea of *peculium* even although the *peculium*, strictly speaking, ceases to exist on the death or manumission of the slave; we talk as if it were still there to make gains such as arise when things bear fruit or slaves or cattle give birth, and suffer losses such as accrue when an animal dies or is otherwise lost.

3

BENEFIT TAKEN

1 ULPIAN, *Edict, book 29:* If the *peculium* of those in the power of another is empty or insufficient to pay the debt in full, and the person with power over them has materially benefited from the performance rendered, that person is liable, much as if he himself had been party to the transaction. 1. It was no empty gesture to provide this action for benefit taken, since the action on the *peculium* is not always available. As Labeo quite correctly pointed out, it may well happen that a relevant benefit exist and yet no action on the *peculium* lie. The master may quite honestly have withdrawn the *peculium*, or the *peculium* may have disappeared on the death of the slave, and the year allowed thereafter for suit may have elapsed; the action for benefit taken, however, is not subject to a time limit and may be brought when the master has quite honestly withdrawn the peculium or the year for bringing the action on the peculium has gone by. 2. Likewise, if several people are claiming on the *peculium*, it offers the one whose money has enured to the master's benefit the advantage of bringing a more fruitful action. But it is a question whether the action for benefit taken does not abate if someone else has already come forward and sued on the *peculium*. In Julian's view, according to Pomponius, such an action on the *peculium* does destroy the

action for benefit taken, since the benefit conferred on the master forms part of the *peculium*; and payment by him on behalf of the slave is tantamount to payment back to the slave. But this is so only if the master, when sued on the *peculium*, actually disgorges the benefit which the slave had conferred on him; failing such a disbursement, the action for benefit taken remains available.

2 JAVOLENUS, *From Cassius, book 12:* A person who has manumitted a slave after being paid to do so cannot be sued for benefit taken, since taking the money and bestowing the freedom has not made him any better off.

3 ULPIAN, *Edict, book 29:* If a slave obtains his freedom from his master with money he has borrowed from me, the money does not become part of the *peculium*; but if the sum given exceeds his value as a slave, the excess is treated as enuring to the master's benefit. 1. There are different ways of conferring a benefit: The slave may utilize for his master's purposes the very thing he has received, as when he feeds the master's household with the wheat he obtained, or he may pay to one of his master's creditors the money he himself has borrowed (such payment, according to Pomponius in his sixty-first book, confers a benefit even if it is made to a person erroneously supposed to be a creditor, the benefit consisting of what the master can reclaim as not having been due). Or the slave may have effected a transaction, such as borrowing money with which to buy food or clothes for the household, in the course of managing or administering the master's business, or he may have borrowed money on the strength of the *peculium* and used it for his master's purposes; for in our law an action for benefit taken may lie even if the money is first paid into the *peculium* before being paid out for the master's benefit. 2. We can say as a general rule that an action for benefit taken lies whenever an authorized general agent or an unauthorized administrator could bring a claim as such, as well as when a slave has used funds for the improvement or maintenance of his master's property. 3. Labeo says that a slave who spends money to feed or clothe himself is treated as conferring a benefit on the master if he does so in accordance with the master's usual practice, that is, within the limits of the provision which the master normally made. 4. But he will not be treated as conferring a benefit if he uses borrowed money to adorn his master's house with stucco or other useless luxuries, since such expenses would not be recoverable by a general agent, unless indeed the master had given his authority or consent; for the master is not to be charged for what he himself would not have done. What, then, is the position? The master must let the lender remove these additions, leaving the house undamaged, but is not required to sell the house and hand over the amount by which its value has been increased. 5. Labeo also says that if a slave borrows money from me and lends it to a third party, I may bring an action for benefit taken against his master, because the master now has a claim against that third party. Pomponius approves of this view only if the loan was made on the master's account, so to speak, rather than on the *peculium*; and even in such a case the master's only liability, unless he sees some advantage in retaining his claim against the debtor, is to cede the debt to the lender and to authorize him to collect on it. 6. Labeo says that a benefit also enures to the master when a slave uses borrowed money to buy luxury items such as ointments or things for titillation or vicious practices; for we do not ask whether the

expenditure did the master any good, but rather whether it was incurred in one of his transactions. 7. So it is right to say that if the slave buys corn to feed the household and stores it in the master's granary, a benefit is still conferred even if the corn is then lost, spoiled, or burned. 8. And I would say that an action for benefit taken must lie if he buys a slave which the master needed and the slave dies, or if he buttresses an apartment-block and it nevertheless collapses. 9. But if the slave misleads a moneylender by pretending that he is going to use the money he borrows for the master's purposes and does not so use it, there is held to be no benefit and the master is not liable; for otherwise the master would suffer for the gullibility of the lender or the plausibility of his slave. Even if the slave was a regular borrower of money for his master's use, I do not think that the master should suffer when the slave borrows the money with the wrong intention or where, having borrowed the money with the right intention, he later pays it to a third party. The lender, therefore, must be very careful to check how the money is to be used. 10. If the slave borrows money for the purchase of clothes and loses it, is it the lender or the vendor who can bring an action for benefit taken? If the price has been paid, I think that the lender can sue for the benefit taken even if the clothes have perished. And if the price has not been paid, I think that the lender still has an action for benefit taken if the money lent for the purchase of clothes has been lost and the clothes have been distributed among the household. But since the vendor's property has been used for the master's benefit, should he not have an action as well? The reason of the thing suggests that he should, and so the master becomes liable to two people on a single transaction. Thus, if both the money and the clothes are lost, we must conclude that the master is liable to lender and vendor alike, since both of them consented to the use of their assets for the master's benefit.

4 GAIUS, *Provincial Edict, book 9:* But since it would be unjust to hold the master liable to both of them for the benefit he received, we must hold that the first to sue must succeed.

5 ULPIAN, *Edict, book 29:* Pomponius says that if a slave buys things, such as other slaves, in the erroneous belief that the master needed them, the master is benefited to the extent of their actual value, whereas he would be liable for their full purchase price if he had really needed them. 1. He also says that the action for benefit taken lies whether or not the master has ratified the slave's transaction. 2. If the slave makes a purchase with the consent of his master, an action based on authorization will lie; where there is no such consent, an action for benefit taken will lie if the master ratifies the transaction or if the thing purchased was necessary or useful to the master; in the absence of such facts, the action must be on the *peculium.* 3. In order to constitute a benefit, money need not pass directly from the creditor to the master; it may pass through the *peculium* first. But while this applies in cases where the slave is managing the business of the master and uses money from the *peculium* for his benefit, it does not count as a benefit taken if the master withdraws the *peculium* from the slave or makes a cash sale of the slave and *peculium* together, or of property belonging to the peculium.

6 TRYPHONINUS, *Disputations, book 1:* For if it were otherwise, he would be liable for benefit taken even before he sold the property of the *peculium,* because the very fact that the slave has it in the *peculium* makes him richer; and this is patently not the case.

7 ULPIAN, *Edict, book 29:* Consequently, no action for benefit taken will lie if the slave makes a gift to the master of property from the *peculium;* this is true enough. 1. Of course, if a slave borrows money and hands it over as a gift with no intention of putting the master in debt to the *peculium,* an action for benefit taken will lie. 2. Mela is in error when he says that you can sue me for benefit taken if you gave silver to a slave of mine who was to make cups for you, though not necessarily out of

that silver, and he died after making the cups; in such a case, I may vindicate the cups. 3. But Labeo is clearly right to say that a benefit accrues to the master if his slave buys perfumes and oils and uses them for a funeral in which the master has an interest. 4. He also says that if I buy an inheritance of yours from your slave and you take it away from me after I have paid off its creditors, suit against you on the sale will enable me to recover what I paid them, since you are benefited to that extent; and if the reason I bought the inheritance from the slave was to effect a set-off of what he personally owed me, I can still recover any benefit accruing to the master by suing him on the sale, even though I did not actually pay anything. But in my view, the purchaser only has an action for benefit taken if the slave was acting with the intention of benefiting his master. 5. A son-in-power who uses borrowed money to constitute a dowry for his daughter is held to confer a benefit on his father to the extent of the dowry that the latter would have provided for his granddaughter. But in my opinion this only holds good if the son was consciously acting on his father's behalf when he made the gift.

8 PAUL, *Edict, book 30:* According to Pomponius, such a gift may be made equally well on account of a daughter or a sister or a brother's daughter. So the rule applies where it is a slave, acting on his master's behalf, who borrows the money and constitutes the dowry for the daughter.

9 JAVOLENUS, *From Cassius, book 12:* But if the father would not have given a dowry, no benefit can be seen as accruing to him.

10 ULPIAN, *Edict, book 29:* A benefit accrues to the father when his son stands guarantor for him and pays off his creditor, because the father is thereby released. 1. Papinian gives a similar case in the ninth book of his *Questions*, saying that a father is liable for benefit taken if his son voluntarily defends a lawsuit against him and is held liable; for the father is released when the son accepts the suit. 2. Papinian also deals with the case where I stipulate from a son for what his father owes me and then sue the son on the stipulation; for here, too, an action for benefit taken arises, unless the son intended, on assuming the obligation, to make a gift to his father. 3. It follows that if the son voluntarily defends his father in an action on the *peculium*, the father is liable to an action for benefit taken up to the amount of the *peculium*. The advantage of this view is that suit may lie for benefit taken even if the action on the *peculium* no longer lies. And the father, in my opinion, can be held liable for benefit taken as soon as the action has been accepted in the father's name; one need not wait for judgment. 4. A benefit is treated as accruing as soon as any benefit accrues; on the accrual of a part, an action for that part will lie. 5. But is the master liable only for capital or for interest as well? Marcellus writes in the fifth book of his *Digest* that the master must pay any interest that was promised, but that if none was promised, none is due, because it was not included in the stipulation. But I can clearly claim interest in an action for the management of affairs if, when I gave money to the slave on his master's business, it was I myself rather than the slave that was acting as manager. 6. Only benefits which last are treating as accruing, so no action for benefit taken will lie once the master has paid the sum over to the slave or son. But although the payment may terminate the benefit when the father or master makes the payment simply in order to harm the creditor, as where the slave or son will waste the money, he can very fairly be held liable to an action for fraud; after all, if the master had been indebted to the *peculium*, a fraudulent payment to the slave would not have released him. 7. If a slave who is indebted to his master pays him off with borrowed money, the master obtains no benefit until the amount of the debt is reached, but only for any excess. Thus, if the slave

owes the master thirty, only ten may be claimed in an action for benefit taken should he borrow forty and use it to satisfy one of the master's creditors or feed the family; if he owed his master forty, there would be no benefit at all. For the remedy is given to prevent gain to the master, as Pomponius says, and just as the master receives no benefit if the slave was in debt to him when he paid the money, so the benefit ceases to exist if the slave becomes indebted to him later, just as if the money were being paid back to him. He goes on to say that if the slave has paid one of his master's creditors and the master then gives him a like sum of money, the benefit ceases to exist, if the intention was to make a refund, but continues if there were some other motive. 8. He also asks whether any benefit survives in a case where the slave who has used ten on his master's property borrows ten from his master at a time when he already has ten in his *peculium*. Given that there is a *peculium* from which the debt can be deducted, should we allow the action for benefit taken or should we deduct in both actions pro rata? For my part, I think that the action for benefit taken ceases to be available when the slave becomes indebted to his master. 9. He also takes the case where the slave, having conferred a benefit on your property and then become indebted to you, thereafter becomes your creditor for as much as he owes you. Does the action for benefit taken revive, or is it insusceptible of validation by subsequent events? The latter is the correct view. 10. He also deals with the question whether a benefit can be conferred on the father by the son indirectly, as in the case where father and son are joint debtors and the son uses borrowed money to pay off the creditor on his own account, or where you lend money to the son on the father's authorization and the son pays you back the amount he borrowed. It seems to me that it will count as a benefit taken if the money comes into the father's hands, but that no action for benefit taken will lie if it did not, and the son was paying in pursuance of his own interests.

11 PAUL, *Edict, book 30:* If a slave uses borrowed money to pay off a creditor of his own, this saves the master from an action on the *peculium*, but it does not constitute a benefit taken.

12 GAIUS, *Provincial Edict, book 9:* If a slave or son-in-power buys landed property for his father or master, the amount of the benefit taken is its true value if it was worth less than its purchase price, or the price paid for it if it was worth more than it cost.

13 ULPIAN, *Edict, book 29:* If a benefit is conferred on one of two owners, can action be brought only against the one who receives the benefit or also against his partner? In Julian's view, which I think is correct, only the party who benefited is liable, just as only the one who authorised a transaction is liable on that ground.

14 JULIAN, *Digest, book 11:* MARCELLUS notes: Sometimes an action for benefit taken may be brought against one partner in respect of a benefit conferred on another, and then the defendant can reclaim from his partner what he has been held liable to pay. This would be so, would it not, where one owner had withdrawn his *peculium* from the slave? PAUL: So if no action can be brought on the *peculium*, this is the way to proceed.

15 ULPIAN, *Disputations, book 2:* Should an action for benefit taken be granted where a son-in-power informally agrees to pay off his father's debt? The difficulty is that the father has not been released, for the person who makes such an agreement binds himself without releasing the father. If the son actually pays pursuant to his agreement, he can certainly be said to have conferred a benefit on his father, although it might seem that in view of his agreement to pay, he was paying on his own account.

16 ALFENUS, *Digest, book 2:* A person leased land to a slave of his for cultivation and provided him with some oxen, but as the oxen proved unsuitable, he told the slave to sell them and to buy replacements with the money he got for them. The slave sold the oxen and bought replacements but became insolvent without paying the person he bought them from. That person now claimed the price of the oxen from the master by means of an action on the *peculium* and for benefit taken, the master still having possession of the oxen in respect of which the money was sought. The advice was that there did not seem to be anything in the *peculium,* unless perhaps some balance remained after deducting what the slave owed the master; the oxen did, indeed, constitute a benefit for the master, but they had cost the master the value of the previous oxen, so he should be held liable only to the extent that the replacements were more valuable.

17 AFRICANUS, *Questions, book 8:* If a slave, without being to blame, loses the money he has borrowed with the intention of devoting it to his master's purposes, an action can still be brought against the master for benefit taken; for an agent of mine who borrowed money to spend on my affairs and lost it without being to blame could sue me either on the agency or for the management of my affairs. 1. If I contract with Stichus, the underslave of your slave Pamphilus, I may bring an action on the *peculium* and for benefit taken for any benefit accruing either to you yourself or to the *peculium* of Pamphilus. This is so even if Stichus has died or been transferred at the time I bring the action, but if Pamphilus has died, any action in respect of benefit conferred on his *peculium* must be brought within a year of his death, even though Stichus is still alive; for in a certain sense I shall be suing on the *peculium* of Pamphilus just as if I had lent money on his authorization and were suing for that. The fact that Stichus, whose *peculium* is in issue, is still alive should not worry us, since a thing can only be in his *peculium* if Pamphilus's *peculium* is still in existence. By the same reasoning, your liability is computed on the basis that debts due to you from Pamphilus are deductible from benefits accruing to his *peculium,* but not from any benefits conferred on you directly.

18 NERATIUS, *Parchments, book 7:* If you stand surety for my slave in a transaction for my benefit; for example, if the slave is buying corn to feed my family and you stand surety for him to the corn merchant, you can only sue me on the *peculium* and not for benefit taken; in any transaction, only one person should be able to sue for benefit taken, namely the person who provided the actual thing that benefited the master.

19 PAUL, *Questions, book 4:* A father used a toga as a funeral garment for his son-in-power, thinking that it was his own property and not realizing that the son had purchased it. Neratius, in his *Replies,* says that this is treated as a benefit accruing to the father. Now in an action on the *peculium* no account is taken of a thing which is no longer in existence, unless its disappearance is due to the fraud of the defendant, but if the father was bound to buy the son a toga, the benefit accrued to the father not at the time of the funeral, but at the time of the purchase, and he became a debtor of the *peculium* then, with the result that he can be sued on the *peculium* even though the thing no longer exists. Any benefit accruing can be taken into account in this action, though it is only necessary to add this if more than a year has elapsed since the son died. (Burying the son is the responsibility of the father, and Neratius's view that the father is liable for benefit taken shows that he, too, thinks that the business of arranging the burial and funeral service for the son is the father's responsibility and not the son's.)

20 SCAEVOLA, *Replies, book 1:* A father who had promised a dowry on behalf of his daughter failed to honor his agreement to provide for her maintenance, so she borrowed money from her husband and subsequently died in wedlock. My advice was that if the borrowed money was spent on things needed for her maintenance or the equipment of her father's slaves, an action analogous to the action for benefit taken should be granted. 1. When a man was abroad on public business, his slave lent money to the slaves of a *pupillus*, the stipulation being made in the name of the tutor and endorsed by him. The question was whether an action lay against the *pupillus*. My advice was that if the tutor's promise was given simply in order to back the slaves' action, a claim for benefit taken lay against the *pupillus*, supposing the money was to be used for his benefit and was in fact so used.

21 SCAEVOLA, *Digest, book 5:* On the marriage of a daughter-in-power her father promised a dowry, and it was agreed between all parties that either the father or the bride herself would provide for her maintenance. The husband lent his wife some money in the very reasonable belief that the father would provide his daughter with the agreed sums, and she not only spent the borrowed money on necessaries for herself and the slaves she had with her but also used a certain amount of her husband's money for these purposes, the management of the household having been entrusted to her. She then died before her father had paid the support money. The father rejected these expenditures, and the husband retained the wife's property. The question was whether an action for benefit taken lay against the father. My advice was that an action based on the action for benefit taken should be granted if the borrowed money had been spent on things needed for her own maintenance or the equipment of her father's slaves.

4

AUTHORIZED TRANSACTIONS

1 ULPIAN, *Edict, book 29:* It is right that authorization by the master should render him liable for the full amount, for in a sense the person who authorizes a contract becomes a party to it. 1. Authorization in this connection may be given by will or by letter or orally or through an intermediary and either specifically for a single transaction or generally. So a person who states publicly, "do any business you like with my slave Stichus; it will be at my risk," is taken to have authorized all kinds of transactions unless there is a specific exclusionary clause. 2. Can such authorization be revoked before action is taken on the faith of it? I think it can, just as if he had given authority to an agent and then, before any contract was made, changed his mind, revoked the agency and so informed me. 3. A father or master is treated as giving authorization if he grants a power of agency. 4. And a master who endorses his slave's chit is liable for authorizing the transaction. 5. What if he stands guarantor for his slave? Marcellus says that this does not make him liable on the basis of authorization; for he might have intervened as an independent person. The reason is not because the master is liable on the guarantee, but because there is a difference between giving authorization and giving a guarantee. Finally, Marcellus says that the master is not bound on the basis of authorization even if the guarantee is invalid, and this is the better view. 6. An action on an authorized transaction lies against a person who ratifies what his slave or son has done. 7. A master who is a *pupillus* is not liable for

authorizing a transaction unless the authorization was with his tutor's permission. 8. If a slave makes a contract with the authorization of his usufructuary or of the person whom he is serving in good faith, Marcellus thinks that they should be liable to the action on an authorized transaction. 9. If the curator of a youth, madman, or spendthrift authorizes the slave to make a contract, Labeo thinks that the action on an authorized transaction lies against the slave's owner. So, too, where the person giving the authorization is a proper procurator, but if he is not a proper procurator, Labeo says that the action lies against him personally instead.

2 PAUL, *Edict, book 30:* If a loan is made to the slave of a *pupillus* on the authorization of his tutor and the loan was useful to the *pupillus*, an action should be given against him for what his tutor authorized. 1. If a master authorizes a loan to his slave-girl or a father to his daughter, they are subject to the action on an authorized transaction. 2. If I authorize a transaction with someone else's slave and later purchase that slave, I am not liable to the action on an authorized transaction; for that would be to use later events to validate a transaction which was initially invalid.

3 ULPIAN, *Replies, book 2:* A master who authorizes money to be lent to his slave at six percent interest is liable to the extent of his authorization, but a slave cannot create a security interest in land without his master's consent.

4 ULPIAN, *Edict, book 10:* Pomponius says that the action on an authorized transaction lies against the person in charge of a city administration if he authorizes the making of a contract with one of the city's slaves.

5 PAUL, *Plautius, book 4:* If a master or father orders the money he is borrowing to be handed over to his slave or son, he is unquestionably liable to a *condictio*; indeed, no action on an authorized transaction lies in such a case. 1. If a slave has two owners and one of them authorizes the making of a contract with him, that master alone is liable; but if both of them give their authorization, they are just like two principals and an action can be brought for the full amount against either.

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